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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ELROD and

TYRONE C. FAHNER, Attorney General,
State of Illinois,

*Petitioner,*

vs.

BENEDETTO J. MASSARELLA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Whether the opinion of the court of appeals holding that a habeas corpus petitioner's voluntary election to be sentenced under a statute enacted after his offense violates the *ex post facto* clause conflicts with this Court's decisions in *Francis v. Henderson*, *Wainwright v. Sykes*, and *Engle v. Isaac*.

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TYRONE C. FAHNER, Attorney General,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit holding that a habeas corpus petitioner incurred *ex post facto* punishment when the State of Illinois permitted him to elect between two successive criminal statutes at the time of his sentencing. The court below decided, contrary to holdings of the Illinois courts, that the statute which the petitioner elected to be sentenced under subjected him to

enhanced collateral consequences, and it ordered the state to resentence him under the former statute without regard to the right of election provided for in the Illinois statutes. *United States ex rel. Massarella v. Elrod*, ..... F.2d ..... (7th Cir. 1982). (Appendix A at 5a).

The court of appeals thereby reversed a decision of the United States District Court for the Northern District of Illinois which held that the petitioner's election to be sentenced under the laws in effect at the time of sentencing was in accordance with his desires and therefore not violative of the *ex post facto* clause. *United States ex rel. Massarella v. Elrod*, 510 F.Supp. 1082 (N.D. Ill. 1981). (Appendix B at 3b).

Prior to the filing of the petition for writ of habeas corpus, the Illinois Appellate Court had affirmed the petitioner's conviction for reasons similar to those expressed by the federal district court. *People v. Massarella*, 80 Ill.App.3d 552, 400 N.E.2d 436 (1st Dist. 1979). (Appendix C at 5c). Also, the Illinois Supreme Court had denied, without comment, a petition for leave to appeal from the appellate court's decision. *People v. Massarella*, 81 Ill.2d 586 (1980).

This Court previously denied a petition for writ of certiorari of the defendant seeking to reverse the decision of the Illinois Appellate Court. *Massarella v. Illinois*, 449 U.S. 1077 (1981).

## JURISDICTION

The court of appeals' decision was rendered on July 14, 1982. A petition for rehearing was denied September 23, 1982. This petition is sought to be filed within 90 days of the date the court of appeals denied the petition for rehearing as required by 28 U.S.C. §2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### CONSTITUTIONAL PROVISIONS

**United States Constitution**

Article I, Section 10, Cl. 1:

"No State shall . . . pass any . . . ex post facto law. . . ."

### STATUTES

**Illinois Revised Statutes, 1971**

Chapter 38, Section 2-7:

"Felony" means an offense punishable with death or by imprisonment in the penitentiary."

Chapter 38, Section 2-11:

"Misdemeanor" means any offense other than a felony and includes conduct prohibited by a statute which provides no penalty for its violation.

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a

false statement, material to the issue or point in question, which he does not believe to be true.

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

**Illinois Revised Statutes, 1973**

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

* * *

(d) Sentence.

Perjury is a Class 3 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Chapter 38, Section 1005-1-4:

"Conditional Discharge" means a sentence or disposition of conditional and revocable release without probationary supervision but under such conditions as may be imposed by the court.

Chapter 38, Section 1005-5-3:

(a) Every person convicted of an offense shall be sentenced as provided in this Section, except in cases of murder to which Section 5-8-1A of this Code is applicable.

* * *

(d) When a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to:

(1) a period of probation or conditional discharge except in cases of murder, rape, armed robbery, violation of Sections 401(a), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act or violation of Section 9 of the Cannabis Control Act;

(2) a term of periodic imprisonment;

(3) a term of imprisonment;

(4) a fine. However, a fine shall not be the sole disposition in felony cases but may be imposed in such cases only in addition to another disposition under paragraph (d) of this Section.

Chapter 38, Section 1005-7-1:

(a) A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night or for periods of days, or both. Unless the court orders otherwise, the particular times of release shall be determined by the Department of Corrections, the sheriff, or the Superintendent of the house of corrections, who is administering the program.

* * *

(c) The court may impose a sentence of periodic imprisonment for a felony or misdemeanor on a person who is 17 years of age or older. The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant.

(d) A sentence of periodic imprisonment may be for a term up to 2 years, or the longest sentence of imprisonment that could be imposed for the offense, whichever is less. The term of the sentence shall be calculated upon the basis of the duration of its term rather than upon the basis of the actual days spent in confinement.

Chapter 38, Section 1005-8-1:

(a) A sentence of imprisonment for a felony shall be an indeterminate sentence set by the court under this Section.

(b) The maximum term shall be set according to the following limitations:

* * *

(4) for a Class 3 felony, the maximum term shall be any term in excess of one year not exceeding 10 years.

Chapter 38, Section 1008-2-4:

Prosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act. If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced.

Chapter 131, Section 4:

(This statute is presently located in Chapter 1, § 1103 of the 1981 Illinois Revised Statutes, without change.)

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

## STATEMENT OF THE CASE

On August 26, 27 and 30, 1971, Benedetto J. Massarella gave false testimony under oath in judicial proceedings which he himself commenced against the Illinois Department of Revenue and some of its employees in the Circuit Court of Cook County, Illinois, for the purpose of enjoining the defendants from continuing a criminal tax investigation of Massarella and his solely owned corporation, Bee Jay's Truck Stop, Inc.

On the dates when he gave false testimony, perjury under Illinois law was an offense that could be punished by a fine and, or, a penitentiary term of from one to 14 years, or by incarceration in a penal institution other than a penitentiary for up to one year. The alternative feature of punishment other than incarceration in a penitentiary resulted in the offense being classified a misdemeanor under Illinois law.[1]

In January, 1973, Illinois adopted a Unified Code of Corrections (the "Code") in which perjury was classified a felony. This occurred 16 months after Massarella gave the false testimony. The statute of limitations, both before and after enactment of the Code, was 18 months for misdemeanors and 36 months for felonies.

Massarella was indicted along with several others for conspiracy, perjury, and theft of $425,407 of state motor fuel taxes on June 8, 1973, 22 months after his commission of perjury. He moved to dismiss the perjury charges, alleging that the indictment was returned beyond the 18-

[1] Classification of crimes as either misdemeanors or felonies affects consequences of punishment not only as to the place of incarceration but as to the right to pursue certain licensed occupations and to vote.

month statute of limitations. The trial judge held that the statute had been extended to 36 months before it had run as to Massarella's criminal acts.

Massarella was tried by a jury in 1974, and verdicts of guilty were returned against him for conspiracy, perjury and theft of $425,407 in state motor fuel tax funds. Illinois law requires the merger of substantive and inchoate offenses at sentencing, and therefore the conspiracy conviction was vacated.

When Massarella appeared for sentencing on January 8, 1975, the trial judge, in accordance with the provisions of the Code with respect to superseding mitigating penalties, offered him the option of being sentenced under the statutes in effect at the time his criminal acts were committed or under the Code. The Code attempted to unify and organize various statutes relating to crimes and punishments. It provided for certain lesser alternative forms of punishments such as "conditional discharge" and "periodic imprisonment" not found in the prior statutes. It reduced the maximum penitentiary term for the offense of perjury from 14 years to 10 years but increased the possible fine from $1,000 to $10,000. After conferring with his attorney, Massarella elected to be sentenced under the provisions of the Code.

The trial judge sentenced Massarella on the theft charge to five years' probation conditioned on his serving two of those years in periodic imprisonment, imposed a $10,000 fine, and ordered him to pay restitution to the State in the amount of $425,407. As to the perjury conviction, the judge sentenced Massarella to a penitentiary term of from one to three years and imposed a fine of $10,000. The judge also ordered that the term of periodic imprisonment for theft run concurrently with the penitentiary sentence for perjury and that any time served under periodic imprisonment be credited against the penitentiary term.

Massarella appealed the convictions and sentences to the Illinois Appellate Court. That court first reversed, holding that the Illinois Attorney General, who had prosecuted the case, did not have statutory power to prosecute such offenses under Illinois law. *People v. Massarella*, 53 Ill.App.3d 774, 368 N.E.2d 507 (1st Dist. 1977). The Illinois Supreme Court subsequently reversed and remanded for consideration of other issues which had not been decided by the appellate court. 72 Ill. 2d 531, 382 N.E.2d 262 (1978). On remand, the appellate court affirmed all convictions in a 26 page opinion. 80 Ill. App.3d 552, 400 N.E.2d 436 (1st Dist. 1979). (Appendix C). The Illinois Supreme Court denied Massarella's petition for leave to appeal. 81 Ill.2d 586 (1980). This Court denied a petition for writ of certiorari. 449 U.S. 1077 (1981).

Massarella then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois. The district court judge denied the petition. 510 F. Supp. 1082 (N.D. Ill. 1981) (Appendix B). The United States Court of Appeals for the Seventh Circuit, on July 14, 1982, reversed and remanded, holding that although there was no *ex post facto* violation resulting from the extension of the statute of limitations, the reclassification of perjury under the Code meant that Massarella stood convicted of a felony for which he was subject to adverse collateral consequences. The court of appeals ordered the district court to issue the writ and to order the state to resentence Massarella under "the law in place when [the] crime occurred." ..... F.2d ..... (7th Cir. 1982) (Appendix A at 5a). However, Illinois law still gives Massarella the option to elect under which statute he wishes to be sentenced. Thus an apparent conflict exists between state law and the court of appeals' mandate.

Both the petitioner and respondent filed petitions for rehearing *in banc*, which were denied on September 23, 1982. (Appendix H)

## REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

### I.

### THE OPINION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *FRANCIS v. HENDERSON, WAINWRIGHT v. SYKES* AND *ENGLE v. ISAAC.*

When he denied the petition for writ of habeas corpus, the district court judge held that Massarella, having been afforded the option of being sentenced under either of two statutes, had made a reasoned election to be sentenced under the superseding one and therefore did not suffer a deprivation of his constitutional rights as regards the *ex post facto* clause. (Appendix B at 1b-3b). The Illinois Appellate Court had also so held. (Appendix C at 5c). Illinois statutes give a criminal defendant the right to make an election of laws whenever an applicable statute has been changed after commission of an offense but before sentencing. Ill. Rev. Stat., 1973, Ch. 131, §4; see also, Ill. Rev. Stat., 1973, Ch. 38, §1008-2-4. Thus Massarella's voluntary election to be sentenced under the Code was one that he shared with all other defendants similarly situated.

This election on the part of Massarella should have foreclosed federal habeas corpus review in this case. When he elected to be sentenced under the Code, he voluntarily rejected his right to be sentenced under the repealed statute. *Francis v. Henderson*, 425 U.S. 538 (1976), *Wainwright v. Sykes*, 434 U.S. 880 (1977) and *Engle v. Isaac*, ..... U.S. ....., 102 S.Ct. 1558 (1982) were, and are, pertinent since even the court below recognized that Massarella "rationally chose to be sentenced under the later law, which set a higher fine but a lower maximum sentence for perjury," (Appendix A at 3a), and

the district court judge found that Massarella "must have considered himself benefited by the sentencing regimen of the new act or presumably he would have chosen the old one." (Appendix B at 3b).

Massarella's voluntary selection of optional sentencing statutes should have been held to foreclose habeas corpus relief.

## II.

## THE OPINION BELOW DEFIES CONTROLLING STATE DECISIONAL LAW AS TO THE CONSTRUCTION OF ILLINOIS STATUTES.

The court below found that Massarella's sentence carried with it the consequences of a felony conviction under Illinois law. Since the State of Illinois has never attempted to assert any of the collateral consequences incident to felony convictions against Massarella, both he and the court of appeals only speculate that such a result will follow from the state criminal proceedings. This is patently erroneous. The court below ignored an Illinois statute which precludes retroactive application of enhanced classifications of crimes. Former Ill. Rev. Stat., 1973, Ch. 131, §4 (presently Ill. Rev. Stat., 1981, Ch. 1, §1103) prohibits any retroactive substantive legislative changes except provisions mitigating penalties, forfeitures or punishment *when consented to by the defendant.* According to the judgment order (See Appendix F), Massarella was convicted only as charged in the indictment, which was for violating the *1970* statute classifying the offense of perjury as a misdemeanor. (Appendix G)

In another earlier opinion, the court below held that the last mentioned statute precludes *ex post facto* application of a criminal law and that it only allows for retroactive application of *mitigating* effects, if consented to by

the defendant. *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972). The opinion below is inconsistent with that opinion.

*Twomey* correctly perceived Illinois law in the way that the Illinois courts have interpreted it: *People v. Collins*, 37 Ill.App.3d 202, 345 N.E.2d 730, 732-3 (1st Dist. 1976) (holding that a misdemeanor cannot be retroactively made a felony); *People v. Liebling*, 36 Ill.App.3d 1073, 344 N.E.2d 520, 523 (1st Dist. 1976) (holding that there can be no *ex post facto* application of a new law to the detriment of a defendant); and *Vendo Company v. Stoner*, 58 Ill.2d 289, 310, 321 N.E.2d 1, 12, *cert. denied* 420 U.S. 975 (1974) (holding that no statute is retroactive unless expressly made so). The Code was not expressly made retroactive *except as to mitigating punishments* (Ill. Rev. Stat., 1973, Ch. 38, §1008-2-4), and by virtue of Ch. 131, §4, such retroactive application was further conditioned on defendant's consent. The court below therefore erred in failing to defer to controlling Illinois decisional and statutory law. *Cf. Shad v. Borough of Mount Ephraim*, ..... U.S. ....., 101 S.Ct. 2176, 2181 (1981).

This Court in *Engle v. Isaac* discussed the costs imposed on our federal system by improvident grants of writs of habeas corpus. Massarella's election to be sentenced under one statute during state criminal proceedings and his subsequent complaint about alleged incidental consequences of that election smack of gamesmanship. Consider his strategy: 1) In his Petition for Rehearing to the Court of Appeals he states:

> Secondly, defendant was made to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97, 2302). He chose the new law. (See Sl. Op. p. 3, fn. 3). The Court's decision, requiring that he be resentenced under the old law,

> cannot be carried out without doing grave violence to defendant's most basic constitutional rights.

(Appendix D at 7d-8d). As part of a Motion for Stay of Mandate Pending Application for Writ of Certiorari To The Supreme Court, Massarella's appellate counsel in an affidavit states: "[I]f resentence time comes at the State level . . . [a]ppellant would argue that no sentence at all could be imposed." (Appendix E at 2e-3e).

These statements foretell that Massarella will, when the case is returned for resentencing, insist that state law gives him the right to elect sentencing statutes and that federal constitutional law restricts that right—at least as interpreted by the court of appeals in this case—and therefore the State of Illinois cannot sentence him under any circumstances. The opinion below should be reversed to prevent this type of abuse of the writ of habeas corpus.

## III.

## THE COURT SHOULD RECONSIDER *BROWN v. ALLEN* AND FURTHER DEFINE THE SCOPE OF COLLATERAL REVIEW UNDER 28 U.S.C. §2254.

Massarella had a full and complete review of the *ex post facto* question in the state courts. The adequacy and fairness of the state process are unassailable; the only meaningful issue brought over to the federal courts was the correctness of the judicial conclusions as to the application of the *ex post facto* clause to the circumstances in this case.

The court of appeals disagreed with both the state courts and the district court judge as to whether there was, in fact, an *ex post facto* violation. Regardless of the correctness of the opposing conclusions, Massarella was afforded an adequate and fair review of his constitutional claims prior to filing his habeas corpus petition. The

issue upon which the court of appeals ordered the writ did not involve the fact-finding process of determining guilt or innocence.

This Court should reconsider the implications of its opinion in *Brown v. Allen*, 344 U.S. 443 (1953), and in view of the extent to which courts have gone in interpreting that opinion, should formulate further guidelines, consistent with the objectives of 28 U.S.C. §2254, which will avoid excessive collateral review of state judicial proceedings.

## IV.

## THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE *EX POST FACTO* CLAUSE.

The Illinois Uniform Code of Corrections states that "(p)rosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act." Ill. Rev. Stat., 1973, Ch. 38, §1005-8-1. Also, Chapter 131, §4 (presently Ch. 1, §1103) stated that:

> If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

The court below in *James v. Twomey*, *supra*, at 721, said as to the last mentioned statute: "Almost by definition, this prevents [a new criminal statute] from being a constitutionally proscribed *ex post facto* law." Thus, the only basis for the court of appeals' decision was that an "*ex post facto* violation" occurred during the course of the judicial proceedings and not by reason of the legislative enactment of the Code.

But, judicial action does not implicate the *ex post facto* clause. As this Court stated more than half a century ago:

> [T]he constitutional prohibition: "No state shall . . . pass any bill of attainder, *ex post facto* law, or law

> impairing the obligations of contracts," as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.

*Frank v. Mangum*, 237 U.S. 309, 344 (1944). *See also Marks v. United States*, 430 U.S. 188, 191-92 (1977). The legislative enactment of the Code explicitly and zealously prohibited *ex post facto* punishments. Furthermore, Massarella knew beforehand what punishment he was subject to because he decided which of the two penalty provisions he would be sentenced under. Thus he was forewarned of the penalty by what was "on the books" when he elected to be sentenced under the Code. *Cf. Dobbert v. Florida*, 432 U.S. 282, 297 (1977). To withhold the option either then or now would invite equal protection complaints. *Cf. Id.* at 301. The court of appeals compounded its error by misapprehending the *ex post facto* clause as well as the governing Illinois law.

## V.

## THE COURT OF APPEALS ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO RESPONDENTS.

The burden of proving a federal constitutional claim on federal habeas corpus review lies with the petitioner. 28 U.S.C. 2254(d); *Wolfrath v. LaVallee*, 576 F.2d 965, 971, *cert. denied* 439 U.S. 933 (2nd Cir. 1978); *Braxton v. Estelle*, 641 F.2d 392 (5th Cir. 1981). Massarella's "proof" was simply that he had elected to be sentenced under the new Code, which also happened to classify perjury as a felony.[2]

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[2] Although the possible fine was increased under the Code, the maximum period of incarceration was reduced. When considered *in toto*, the punishment cannot be said to have been more onerous simply because of the increase in the fine. *Cf. Dobbert v. Florida*, 432 U.S. 282, 294, 97 S.Ct. 2290, 2299; *Weaver v. Graham*, ..... U.S. ....., 101 S.Ct. 960, 969 (Rehnquist concurring).

Without requiring any other showing from Massarella that felony conviction consequences attended the defendant's election, the court of appeals ruled that it was the state's burden to prove the negative of the petitioner's claims, that is, that Massarella would not suffer adverse collateral consequences by virtue of the reclassification aspect of the new statute. (Appendix A at 4a-5a). The court of appeals' holding erroneously shifted the burden of proof to the respondents, while at the same time rejecting their arguments as to the safeguards afforded by Ill. Rev. Stat., 1973, Ch. 131, §4, and Ch. 38, §1008-2-4.

## VI.

## THE COURT OF APPEALS ERRED WHEN IT REVERSED WITHOUT MAKING A DETERMINATION THAT THE DISTRICT COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

The district court judge denied the petition for writ of habeas corpus in a six-page written order. (Appendix B). In pertinent part, he found that the defendant, by voluntarily electing to be sentenced under the new statute, relinquished any *ex post facto* claims. *Id.* at 3b.

The court of appeals did not evaluate, analyze or criticize the district court's order. Nor did it make the requisite determination that the district court's finding was manifestly erroneous. *Cf. United States ex rel. Crump v. Sain*, 295 F.2d 699, *cert. denied*, 369 U.S. 830 (7th Cir. 1961). It was error for the court of appeals to disregard the district court's finding that Massarella relinquished any *ex post facto* claim by virtue of his election to be sentenced under the new code. *See James v. Twomey*, 466 F.2d 718, 720-21 (7th Cir. 1972); *cf., Engle v. Isaac*, ..... U.S. ....., 102 S.Ct. 1558, 1570-72 (1982).

## VII.

## THE COURT OF APPEALS' OPINION IS UNCLEAR AND AMBIGUOUS AND INVITES SUBSTANTIAL ADDITIONAL APPELLATE LITIGATION.

The court of appeals' opinion, considered in its entirety, holds that the defendant's conviction for perjury was proper, but orders the case to be remanded for resentencing because of what it believes to be the *possibility* of *ex post facto* felony consequences. The court ordered the case remanded to the state trial court "to permit the state court to apply, if possible, the law in place when his crime occurred." Appendix A at 5a.

Yet in the course of its opinion, the court states that:

> We hold, therefore, that Massarella's *conviction* of the retroactively reclassified offense of perjury violated the *ex post facto* clause.

(Emphasis added) Appendix A at 5a. In addition, the court of appeals' order to the state court to apply the law in place when the crime occurred creates an apparent conflict with state law, which requires that any mitigating provisions of superseding statutes be made available to defendants. Thus, no matter what sentence is imposed by the state court, the ambiguity of the court of appeals' opinion will cause years of additional state and federal appellate litigation in addition to the eight years that have already passed and creates unnecessary friction in federal-state relations.

This Court recently warned that the writ of habeas corpus entails significant costs to the state and federal judicial systems, and that "the writ undermines the usual principles of finality of litigation, . . . degrades the prominence of the trial itself, . . . [and] frustrate[s] both the states' sovereign power to punish offenders, and their

good faith attempts to honor constitutional rights." *Engle v. Isaac*, ..... U.S. ....., 102 S.Ct. at 1570-72.

The defendant in this case was convicted eight years ago and, as matters now stand, the only thing that can be said is that the case will require even further examination to decide whether the Illinois courts can withhold the right of election from this defendant as they have been ordered to do by the court below. This result is not sensible.

The case does not involve "manifest injustice," affecting guilt or innocence. Massarella was fairly tried in the state court and allowed to choose which of the two sentencing statutes he wanted to be sentenced under.

## CONCLUSION

For the foregoing reasons, the State of Illinois respectfully urges this Court to grant this petition for writ of certiorari and, upon review, to reverse the court of appeals' decision ordering the issuance of a writ of habeas corpus.

Respectfully submitted,

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November 12, 1982

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1571

UNITED STATES OF AMERICA ex rel. BENEDETTO J. MASSARELLA,

*Petitioner-Appellant,*

*v.*

RICHARD J. ELROD, Sheriff of Cook County, Illinois and TYRONE FAHNER, Attorney General of Illinois,

*Respondents-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois.
No. 81 C 1752—Nicholas J. Bua, *Judge.*

ARGUED JANUARY 15, 1982—DECIDED JULY 14, 1982

Before CUDAHY, *Circuit Judge,* PECK* and FAIRCHILD, *Senior Circuit Judges.*

PECK, *Senior Circuit Judge.* Massarella appeals from the denial of his petition for a writ of habeas corpus. He raises numerous issues on appeal, but only one is of moment. That issue is whether Massarella's conviction of the felony of perjury in Illinois' courts violated the *ex post facto* clause of the Federal Constitution. U.S. Const. art. I §10, cl. 1.

* Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

The facts of Massarella's case are recited in detail in *People v. Massarella*, 400 N.E. 2d 436 (Ill. App. 1979) *cert. denied, Massarella v. Illinois*, 449 U.S. 1077 (1981), and will be stated only briefly here. In 1973 an Illinois jury found Massarella guilty of conspiracy, theft, and one count of perjury. He was sentenced to five years' probation, including two years' periodic imprisonment, for the theft, and one to three years' imprisonment for the perjury. The sentences were to run concurrently. Massarella was also fined, but the present record is not clear on the total amount, nor on the offenses for which fines were imposed.[1]

The history of Massarella's perjury conviction is a convoluted one. Massarella was indicted on June 8, 1973, for statements made around August 30, 1971. At the time of the commission of the perjury, the offense was an "indictable misdemeanor," punishable as either a misdemeanor or a felony. See Ill. Rev. Stat. ch. 38, § 32-2 (1969).[2] At the time of Massarella's indictment, the offense was a "pure" felony. See Ill. Rev. Stat. ch. 38, § 32-2 (1973). The change was effected by the Illinois Unified Code of Corrections, which, Massarella argues,

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[1] *People v. Massarella*, 368 N.E. 2d 507, 508 (Ill. App. 1977) reports $10,000 fines for both the theft and perjury convictions. The Illinois Supreme Court, reversing, noted only one $10,000 fine, but did not tie it to any offense. See 382 N.E. 2d 262, 263 (Ill. 1978). On remand, the Illinois Court of Appeals noted only one fine imposed on Massarella individually. See 400 N.E. 2d 436, 441 (Ill. App. 1979).

[2] An indictable misdemeanor is a relatively new type of offense, created over the last decade or two in connection with new types of criminal conduct, as to which conduct the legislature appears to wish to give the State and/or trial judge a broad discretion in respect of penalty, ranging from the felony penalties of imprisonment in the State penitentiary for more than one year and/or a fine, to the misdemeanor penalties of imprisonment in a correctional institution other than the penitentiary for not more than one year and/or a lessor [sic] fine.

*People v. Houston*, 315 N.E. 2d 192, 195 (Ill. App. 1974), *cert. denied, Houston v. Illinois*, 420 U.S. 936 (1975).

also extended the limitation period for prosecution of perjury from eighteen months to three years. The extension took effect in January of 1973, approximately one month before the former eighteen month statute would have barred Massarella's perjury prosecution. (Massarella was not indicted until about twenty-two months after the perjury was committed.) In this appeal, Massarella argues that, as applied to his case, both the extension of the limitations period and the reclassification of the perjury from "indictable misdemeanor" to felony violate the *ex post facto* clause of the Constitution.

Massarella's objection to the enlargement of the limitation period has no merit. Extending a limitation period *before* a given prosecution is barred does not violate the *ex post facto* clause. *Clements v. United States*, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959). As the Supreme Court recently noted, "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981), *quoting Hopt v. Utah*, 110 U.S. 574, 590 (1884). The extension of the statute of limitations in this case was just such a "merely procedural" change.

The reclassification of the offense is more troublesome. The state argues that the reclassification was merely nominal, since Massarella, as the new Unified Code required, was permitted to choose between being sentenced under the Unified Code or under the law as it stood at the commission of the perjury. Massarella rationally chose to be sentenced under the later law, which set a higher fine but a lower maximum prison sentence for perjury.[3] He now contends that the reclassification of the offense, apart from direct changes in possible sentences,

[3] The state does not argue that this choice constituted a waiver of any of Massarella's rights under the *ex post facto* clause.

created a host of adverse collateral consequences[4] that fall on a convicted felon. Whether this retrospective reclassification worsens the conditions imposed under the former state law is a federal question. See *Weaver v. Graham, supra*, 450 U.S. at 33; *Lindsey v. Washington*, 301 U.S. 397, 400 (1937). In this case, however, it is a question involving numerous and subtle issues of state law.

It is not at all clear that Illinois would not have considered Massarella a felon had he been convicted of perjury in 1971. In 1971 in Illinois, perjury was punishable with a penitentiary sentence. Ill. Rev. Stat. ch. 38, § 32-2 (1969). Under a literal reading of the statutes then in force, the offense was thus a felony. *Id.* § 2-7. On this appeal, however, the state argues that Massarella now stands convicted of a misdemeanor, apparently conceding that the offense was so classed under former law, at least for the purpose of determining the collateral consequences of a perjury conviction.

We must, however, reject the state's argument that, by operation of a state statutory provision concerning the application of the Uniform Code of Corrections,[5] Massarella does not now stand convicted of a felony. For determining the period of limitation on Massarella's perjury prosecution, the state unquestionably classed the offense a felony. See Ill. Rev. Stat. ch. 38, § 3-5; *id.* § 32-2 (1973). Yet after conviction, the state argues a different *classification* of the offense from statutes dealing only with *punishment* of the offense. In short, the state has pointed to nothing to show that Massarella will

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[4] These consequences include: ineligibility for state elective office, Ill. Rev. Stat. ch. 38, § 1005-5-5 (1973); longer curtailment of voting rights, Ill. Const. art. III, § 2 (1970); and disqualification from holding numerous licenses.

[5] Ill. Rev. Stat. ch. 38, § 1008-2-4 (1973), provides that *sentences* under the Uniform Code apply "if they are less than under the prior law upon which the prosecution was commenced." The provisions of the Code are severable, should individual ones be held invalid. *Id.* § 1008-4-1.

not suffer the collateral consequences of which he complains. We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause.

The matter of remedies is a difficult one in this case. Massarella seeks an unconditional writ that would have the effect of vacating his perjury conviction. The Supreme Court, however, has noted that "[t]he proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred." *Weaver v. Graham, supra,* 450 U.S. at 36-37 n.22. (Citing *Lindsey v. Washington, supra,* 301 U.S. at 402.) In so remanding, we are confident that there is little need to point out the constitutional pitfalls of imposing on Massarella any more onerous sentence than he originally received.

Before remanding to the state court, however, the district court should resolve the fact question whether Massarella was fined $10,000 for his perjury conviction. If so, this fine would, under the principles noted above, be an *ex post facto* violation.

We have fully considered Massarella's other arguments and hold that none establishes errors for which habeas corpus relief is appropriate. The judgment of the district court is reversed, and the case remanded for action not inconsistent with this opinion.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA
ex rel. BENEDETTO J. MASSARELLA,

*Petitioner,*

No. 81 C 1752 *vs.*

RICHARD J. ELROD, Sheriff of Cook County, et al.,

*Respondents.*

Before the Honorable
Nicholas J. Bua, *Judge*
United States District Court

## ORDER

Presently before the court is Massarella's petition for a writ of habeas corpus. 28 U.S.C. § 2254. At a hearing on respondents' motion to vacate this court's April 1, 1980 Order setting bond, the parties agreed to submit the questions raised by the petition on the basis of the facts contained in their respective memoranda of law. The petition presents four grounds for relief.

The first issue raised by the petition is whether the application of Ill. Rev. Stat. ch. 38 § 32-2 (1973) to petitioner violated the constitutional ban on state *ex post facto* laws. U.S. Const., Art. 1, § 10, cl.1.

The petitioner was convicted of perjury for statements made between August 26, 1971 and August 30, 1971. He was indicted for violating Ill. Rev. Stat. ch. 38 § 32-2.

Under the 1971 version of the statute, in effect at the time the crime was committed, the petitioner could have been imprisoned in another penitentiary. Illinois courts had construed the statute as a misdemeanor because of this provision. *Cf. People v. Novotny*, 41 Ill. 2d 401, 244 N.E. 2d 182 (1968). The indictment was returned on June 8, 1973, beyond the 18 month limitation period applicable to a misdemeanor at the time the crime was committed. Ill. Rev. Stat. ch. 38 § 3-5. On January 1, 1973, one month before the limitations period for petitioner's crime would have expired, Illinois' Unified Code of Corrections took effect. The Unified Code classified perjury as a Class 3 felony with a three year statute of limitations. Ill. Rev. Stat. ch. 38 §§ 32-2, 3-5 (1973). The application of the new statute of limitations does not violate the *ex post facto* clause. *Clements v. United States*, 266 F.2d 397, 398 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959); *Roberts v. United States*, 239 F.2d 467 (9th Cir. 1957); Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. L.Rev. 1491 at 1512 n.78 (1975).

The petitioner nevertheless argues that the legislative reclassification of perjury from a misdemeanor to a felony violates the *ex post facto* clause. The petitioner maintains that the state trial and appellate courts erroneously focused on the actual sentence imposed on the petitioner rather than the legislative "aggravation" of the offense caused by reclassifying perjury as a felony. *See Calder v. Bull*, 2 U.S. 386, 390 (1798) (separate opinion of Chase, J.).

What the petitioner conveniently fails to point out is that the petitioner, with the advice of counsel, chose to be sentenced in accordance with the 1973 version of the perjury statute. The petitioner correctly quotes *Lindsey v. Washington*, 301 U.S. 397 at 401 (1937) for the proposition that

> the *ex post facto* clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed . . . [and] forbids the application of any new punitive measure to a crime

> already consummated, *to the detriment or material disadvantage* of the wrongdoer. (emphasis added).

However, the petitioner fails to focus on the fact that the import of the ban is the disadvantage imposed upon a wrongdoer without prior notice. The petition conspicuously avoids discussion of the fact that the petitioner had the option of being sentenced under the prior version of the statute. *People v. Liebling*, 36 Ill. App. 3d 1973 (1976). It appears that the petitioner must have considered himself benefited by the sentencing regime of the new act or he presumably would have chosen the old one. The respondents' brief in opposition to the petition for a writ of certiorari filed in the United States Supreme Court indicates that the petitioner in fact was given the choice as to which version of the statute he wished to be sentenced under. Thus, *Weaver v. Graham*, 49 U.S.L.W. 4155 (February 24, 1981) does not support the petitioner's contention, and this court concludes that his constitutional rights were not violated by the application of the 1973 version of the perjury statute to the petitioner's crime.

The petitioner's second claim is that he was deprived of his constitutional right to present a defense by the trial court's exclusion of certain evidence at trial. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). The petitioner attempted to introduce evidence through Milton Lambert as an expert witness qualified by 40 years experience as a wholesale distributor of motor fuel products. The defense attempted to establish the amount of fuel that the petitioner's business had sold during 1971 by hypothetical questions propounded to Lambert as an expert. The trial court sustained objections to Lambert's testimony based, among other things, upon his lack of personal knowledge, and because hypothetical questions propounded to him were based upon facts not in evidence. Based on the facts contained in the respondents' brief in opposition to the petition for a writ of certiorari filed in the United States Supreme Court, the court finds no deprivation of the petitioner's right to present a defense. The exclusion of Lambert's testimony simply

did not materially affect petitioner's ability to present a defense. *Cf. Chambers v. Mississippi*, 410 U.S. 284 at 302 (1973).

The petitioner also claims that the trial court's exclusion of evidence pertaining to his conversations with his accountant rises to the level of a constitutional deprivation. According to respondents' brief referred to above, the trial judge sustained a hearsay objection to evidence of the petitioner's statement to his accountant to the effect that the petitioner thought his gross profit margins on motor fuel sales should have been higher in 1969 and 1970. The testimony was apparently offered to show Massarella lacked the intent to commit a theft of state motor fuel taxes. This hearsay exclusion does not constitute a constitutional deprivation under *Chambers, supra.* It certainly cannot be said that the exclusion of such ambiguous evidence was in any sense critical to petitioner's defense.

The third prong of Massarella's claim that he was deprived of due process at trial is based on the contention that the application of the "best evidence rule" to sustain the state's objection to the admission of certain documentary evidence deprived him of crucial exculpatory evidence. In light of the facts contained in the appendix to respondents' brief at p. 6a, this court believes it frivolous to assert that this evidence was either properly admissible in evidence or crucial to the defense.

The petitioner also maintains that his sixth amendment right to confront the witnesses against him was improperly abridged by the restrictions the trial judge placed upon his counsel's cross-examination of several prosecution witnesses and by its admission of prior testimony given in a civil suit by John Gavin, Sr.

In neither instance does the petitioner's brief allege a single fact from which this court can conclude that his constitutional rights have been violated. The state's brief indicates that the cross-examination of the four witnesses about which petitioner complains fills over

two hundred pages of transcript. Absolutely no indication of an abuse of discretion has been presented by the petitioner in alleging that his right to confront and cross-examine the prosecutions' witnesses was unconstitutionally abridged.

Petitioner's contention that the introduction of prior testimony of a deceased witness deprived him of his rights is without foundation. From the briefs of the parties, it is clear to this court that such testimony was properly admitted and did not deprive petitioner of his constitutional right to confront the witnesses against him. *See Dutton v. Evans*, 400 U.S. 74.

Finally, we reject as unsupported by any evidence or authority the petitioner's contention that he was deprived of any rights by the manner in which the Illinois Appellate Court disposed of these claims on appeal. *See People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E. 436 (1979), *cert. denied*, 49 U.S.L.W. 3493 (1981).

Nothing in the petition supports the claim that the cumulative effect of the evidentiary rulings complained of or the trial judge's supervision of the scope of petitioner's cross-examination of certain prosecution witnesses affected the fundamental fairness of petitioner's trial.

Therefore, the court's order of April 1, 1981 setting bail is vacated, and the petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Nicholas J. Bua
Judge, United States District Court

DATED: April 7, 1981

# APPENDIX C

Second Division
December 18, 1979

No. 61346

PEOPLE OF THE STATE OF ILLINOIS,

*Plaintiff-Appellee,*

*v.*

BENEDETTO J. MASSARELLA, BEE JAY'S TRUCK STOP, INC., and MIDEAST TRANSPORT, INC.,

*Defendants-Appellants.*

Appeal from the Circuit Court of Cook County
Honorable **Marvin E. Aspen**, *Judge Presiding.*

Mr. JUSTICE DOWNING delivered the opinion of the court:

On June 8, 1973, the Cook County grand jury returned a 49-count indictment for conspiracy, perjury, theft, and tax evasion against Benedetto J. Massarella (Massarella); Bee Jay's Truck Stop, Inc. (BJTS), a corporation of which Massarella was president and sole shareholder; Mideast Transport, Inc. (Mideast), a corporation controlled by Massarella; and several others. Prior to trial, all but five counts were dismissed. Massarella was found guilty by a jury of conspiracy, theft, and one count of perjury; sentenced to five years probation, including two years periodic imprisonment (for theft), and one to three years in the penitentiary (for perjury), both sentences to run concurrently; and ordered to pay a $10,000 fine and $425,407 in restitution to the state. BJTS was found guilty of conspiracy and theft; Mideast

was found guilty of conspiracy. BJTS and Mideast were each sentenced to pay a $10,000 fine and ordered to pay $425,407 in restitution to the State of Illinois.

On appeal from these judgments and sentences, the defendants raised the following 15 issues for our review: (1) whether the indictment should have been dismissed due to the Attorney General's participation in the proceedings; (2) whether the court erred in refusing to dismiss the perjury count; (3) whether the state sustained its burden of proving Massarella guilty of perjury; (4) whether the state sustained its burden of proving Massarella and BJTS guilty of theft; (5) whether the court erred in denying Massarella's motion for a substitution of judges; (6) whether the trial judge should have recused himself; (7) whether the trial court erred in denying the defendants' motion for a continuance; (8) whether the defendants were prejudiced by their joint trial on the conspiracy, theft, and perjury charges; (9) whether the defendants were denied a fair trial due to certain evidentiary rulings made by the trial court; (10) whether the defendants were denied a fair trial due to the prosecutor's closing argument; (11) whether the verdict forms finding Massarella and BJTS guilty of theft were sufficient; (12) whether the trial court adequately polled the jury upon the defendants' request; (13) whether the imposition of Massarella's two-year sentence of periodic imprisonment as a condition of five years probation was valid; (14) whether the trial court erred in imposing excessive and unlawful sentences upon all of the appealing defendants; and (15) whether Massarella was denied a fair hearing in aggravation and mitigation.

Finding that the indictment should have been dismissed due to the Attorney General's improper participation in the proceedings, we reversed the defendants' convictions without deciding the remaining issues raised on the appeal. (*People v. Massarella* (1st Dist. 1977), 53 Ill. App. 3d 774, 368 N.E.2d 507.) The supreme court allowed the state's petition for leave to appeal (58 Ill. 2d R. 315), reversed our decision, and remanded the matter to us for consideration of the remaining unresolved

issues (*People v. Massarella* (1978), 72 Ill. 2d 531, 382 N.E.2d 262).

The underlying facts giving rise to the 49-count indictment appear in our previous opinion (see 53 Ill. App. 3d 774, 775-78, 368 N.E.2d 507), and therefore will not be repeated here. Only those facts necessary to the resolution of the remaining 14 issues will be set forth as they are discussed in the opinion.

I.

Count 3 of the indictment charged Massarella individually with perjury committed on or about August 26, 1971 to on or about August 30, 1971, in a related civil proceeding brought by BJTS entitled *Bee Jay's Truck Stop, Inc. v. Illinois Department of Revenue*, case no. 71 CH 3608, in the circuit court of Cook County.[1] In 1971, the statute prescribing the penalty for perjury provided that:

> "A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned." (Ill. Rev. Stat. 1971, ch. 38, par. 32-2.)

Due to the presence of the alternative penalty of imprisonment other than in the penitentiary in 1971, perjury was classified as a misdemeanor. (See *People v. Novotny* (1968), 41 Ill. 2d 401, 403, 244 N.E.2d 182.) The statute of limitations for all misdemeanors at that time was 18 months. (Ill. Rev. Stat. 1971, ch. 38, par. 3-5.) The indictment against Massarella was returned on June 8, 1973, approximately 22 months after the perjury was allegedly committed.

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[1] The disposition of BJTS's appeal from the decision in that proceeding appears in *Bee Jay's Truck Stop v. Dept. of Revenue* (1st Dist. 1977), 52 Ill. App. 3d 90, 367 N.E.2d 173, *cert. denied*, 435 U.S. 970, 56 L. Ed. 2d 61, 98 S. Ct. 1610.

However, the Unified Code of Corrections took effect on January 1, 1973, approximately one month before the 1971 18-month statute of limitations expired in February 1973. (Ill. Rev. Stat. 1973, ch. 38, par. 1008-6-1.) The Unified Code reclassified perjury as a Class 3 felony (Ill. Rev. Stat. 1973, ch. 38, par. 32-2(d)) carrying a maximum term in excess of one year and not exceeding ten years (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(4)), and extended the statute of limitations for perjury to three years (Ill. Rev. Stat. 1973, ch. 38, par. 3-5(b)). Therefore, under the Unified Code, the indictment charging Massarella with perjury committed in 1971 was timely brought.

Massarella contends that the reclassification of perjury from a misdemeanor to a felony as applied to him violates the *ex post facto* laws of the Illinois and Federal constitutions. (Ill. Const. 1970, art. I, §16; U.S. Const., art. I, §9.) From this premise, Massarella argues that the indictment was barred by the 18-month statute of limitations in force in 1971, and, therefore, the trial court erred in refusing to dismiss the perjury count.

A legislative body can extend the period of limitations as to criminal offenses which occurred prior to the effective date of the change without violating the constitutional prohibitions against *ex post facto* laws, so long as the extended period does not apply to any case in which the accused has acquired, as of the effective date of the change, a right to acquittal through the running of the original statute. (*People v. Anderson* (1973), 53 Ill. 2d 437, 440, 292 N.E.2d 364.) In *People v. Liebling* (1st Dist. 1976), 36 Ill. App. 3d 1073, 344 N.E.2d 520, this court held that the legislature's reclassification of conspiracy and bribery from misdemeanors to felonies prior to the expiration of the 18-month statute of limitations and the extension of that statute of limitations to three years did not violate the *ex post facto* doctrine. (*Liebling, supra* at 1077.) However, Massarella argues that *Liebling* is inapplicable because there the defendant did not argue that the very change in the nature of

the offense was barred by the *ex post facto* doctrine. We disagree.

Since Massarella's trial occurred subsequent to the effective date of the Unified Code of Corrections, he was entitled to be sentenced either under the law in effect at the time of the offense or the law at the time of the trial. (See *Liebling, supra* at 1076.) Massarella elected to be sentenced under the Unified Code of Corrections and received a sentence of one to three years in the penitentiary. The constitutional prohibition against *ex post facto* laws is not violated if the defendant is given the option of being sentenced in accordance with the law as it exists at the time of sentencing or as it existed when the offense was committed. (See *Liebling, supra* at 1076-77.) Moreover, although it is the general rule that punishment for an offense cannot be increased by an amendatory act taking effect after the offense has been committed without violating the *ex post facto* doctrine (*People v. Wyckoff* (2nd Dist. 1969), 106 Ill. App. 2d 360, 364, 245 N.E.2d 316), the criterion for determining the lesser penalty is the actual term of imprisonment imposed (*People v. Zboralski* (3rd Dist. 1975), 33 Ill. App. 3d 912, 913, 338 N.E.2d 925). Massarella's sentence of one to three years in the penitentiary did not exact a penalty greater than that permissible under the 1971 statute classifying perjury as a misdemeanor.

For the foregoing reasons, we find that the trial court did not err in refusing to dismiss the perjury indictment against Massarella.

II.

During the course of the aforementioned civil proceeding wherein Massarella sought to enjoin the Department of Revenue from investigating him individually and his business BJTS, Massarella testified that he had bought no diesel fuel from co-defendant Mid-Town Petroleum, Inc. (Mid-Town)[2] prior to January 1971, and

[2] Co-indictee Mid-Town pleaded guilty to conspiracy to commit theft.

that up to December 1970, all of this diesel fuel was supplied by Humble Oil Company. He further testified that he never made purchases of diesel fuel through Rella Enterprises, a sole proprietorship which Massarella owned. Count 3 of the indictment charged that these statements were perjurious. The perjury statute defined the offense as one in which a person under oath at a proceeding makes a false statement material to the issue or point in question, which he does not believe to be true. (Ill. Rev. Stat. 1971, ch. 38, par. 32-2(a).) Massarella contends that the evidence of perjury was insufficient absent any showing that his statements were material, absent proof of falsity, and absent proof of his state of mind. We disagree.

Materiality is a question of law for the court to decide. (*People v. Berry* (1923), 309 Ill. 511, 515, 141 N.E. 132.) However, there is no authority to support the defendant's novel suggestion that, to permit meaningful appellate review, the trial court must make a finding of materiality. An indictment may show the materiality of the testimony on which the perjury is assigned either by setting forth the issue and the sworn statement, or by stating the particular testimony charged to be false, with the allegation that such testimony is material. *People v. Berry, supra* at 513-14.

Contrary to Massarella's sole contention with respect to the sufficiency of the evidence showing the materiality of his allegedly perjurious statements, a certified and exemplified copy of the pleadings and orders in *Bee Jay's Truck Stop, Inc. v. Illinois Department of Revenue*, case no. 71 CH 3608, as well as the entire transcript from those proceedings, was received into evidence without objection and upon stipulation of the parties. The issue in the civil proceeding was whether there was a factual basis for the Department's investigation of Massarella's alleged theft and evasion of state motor fuel tax through the diversion of untaxed diesel fuel to BJTS. We therefore further find that the trial court had before it sufficient evidence to properly determine that Massarella's statements were material to the issue of Massa-

rella's alleged guilt of theft. *Cf. People v. Harris* (5th Dist. 1968), 102 Ill. App. 2d 335, 242 N.E.2d 782.

The perjury statute also required the state to prove that these statements were false. (See Ill. Rev. Stat. 1971, ch. 38, par. 32-2(a).) Relying on *Bronston v. United States* (1973), 409 U.S. 352, 34 L. Ed. 2d 568, 93 S. Ct. 595, Massarella contends that his testimony was at most evasive, unresponsive, or untrue only by false negative implications, but were not false. In *Bronston*, the Supreme Court held that the federal perjury statute does not reach a statement that is literally true and complete, but unresponsive, even if the witness intended to mislead the court. (*Bronston*, *supra* at 357-62.) Massarella contends that the Illinois perjury statute should be interpreted as the federal perjury statute has been interpreted. We need not determine that question for the record of the civil proceeding shows that the questions posed to Massarella and his answers thereto were clear, concise, and direct. Moreover, in the instant trial, Raymond Battersby,[3] the president and principal shareholder of Mid-Town, testified that pursuant to an agreement personally solicited by Massarella in the summer of 1967, Mid-Town sold Massarella and BJTS several million gallons of diesel fuel from August 1967 to December 1970. Battersby also admitted that he lied in the civil proceeding when he denied selling untaxed diesel fuel to BJTS. James Peterson of the Peterson Oil Company testified that he sold Massarella and Rella Enterprises several million gallons of diesel fuel from February 1969 to May 1971. Gino Fortuna and Earl Pruitt, employees of Massarella and BJTS, and Louis Wright, testified that this fuel was delivered to BJTS. A comparison of this and other testimony presented in the state's case with Massarella's testimony in the civil proceeding shows that his testimony was neither unresponsive nor literally true, but rather was patently false. In

[3] Co-indictee Battersby pleaded guilty to conspiracy to commit theft and to perjury.

light of the patent falsity of his testimony, there can be little doubt that Massarella knew his testimony to be false.

III.

Count 6 of the indictment charged BJTS, a corporation, and Massarella, individually and as president of BJTS, with the theft of motor fuel tax monies of the State of Illinois in excess of $150, committed from June 11, 1970 to May 31, 1971. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).) These defendants contend that the state failed to sustain its burden of proving them guilty of this offense.

It is uncontroverted that the county in which the alleged crime was committed is a material averment and must be proved beyond a reasonable doubt. (*People v. White* (1st Dist. 1975), 26 Ill. App. 3d 659, 661, 325 N.E.2d 313.) The indictment charged that the defendants' theft of the state tax monies occurred in Cook County. The defendants first contend that since the alleged offense was exactly comparable to embezzlement, venue could properly lie only in Sangamon County, Illinois, the site of the state capitol and the office of the Department of Revenue of the State of Illinois. (See *People v. Kopman* (1934), 358 Ill. 479, 485, 193 N.E. 516.) We find the defendants' argument to be without merit insofar as they were neither charged with embezzlement nor with the violation of the Motor Fuel Tax Law. (Ill. Rev. Stat. 1971, ch. 120, par. 415.)[4] Rather, the defendants were charged with the separate and dis-

[4] We note that venue in Cook County for a violation of the Motor Fuel Tax Law may be shown by proof that the Department of Revenue maintained an office for the payment of state motor fuel tax in Cook County. (See *People v. Allen* (1935), 360 Ill. 36, 42-43, 195 N.E. 478.) An accountant for the Department of Revenue responded affirmatively when asked, "Does the Illinois Department of Revenue maintain office payments [*sic*] of state motor fuel taxes in Cook County?"

tinct offense of theft. A person who commits theft of property may be tried in any county in which he exerted control over such property. (Ill. Rev. Stat. 1971, ch. 38, par. 1-6(g).) Venue, like other facts necessary to prove the commission of an offense, may be established by circumstantial evidence. *People v. Allen* (1952), 413 Ill. 69, 76, 107 N.E.2d 826.

The evidence shows that the defendants obtained several million gallons of tax-free motor fuel, that BJTS had six diesel pumps which pumped diesel fuel into diesel tractors, and that the charge that was made at all six pumps included motor fuel tax. The evidence further shows that in 1970 the diesel pumps at BJTS displayed a decal which stated that Illinois motor fuel tax of 7½ cents per gallon was included in the cost of the product. When the Illinois motor fuel tax increased from 6 cents to 7½ cents per gallon in 1969, the pump price of the diesel fuel at BJTS increased from 24 cents to 25½ cents per gallon. BJTS was located at 970 Pershing Road in Chicago, Cook County, Illinois, and was licensed by the City of Chicago. We are of the opinion that the only rational conclusion that can be drawn from the evidence is that the defendants obtained and exerted control over the state motor fuel tax monies in Cook County as alleged in the indictment. (See *People v. Mowry* (1955), 6 Ill. 2d 132, 139-40, 126 N.E.2d 683.) Venue was properly established, and we are satisfied that the state's burden of proof of theft was sustained beyond a reasonable doubt.

IV.

On June 12, 1973, Massarella appeared before the presiding judge of the criminal division for arraignment and pleaded not guilty to the charges in the indictment. On June 15, 1973, the remaining defendants were arraigned and the cause was assigned to the Honorable Marvin E. Aspen and continued to July 18, 1973, on which date Massarella filed a written verified motion supported by his affidavit for a substitution of judges

pursuant to Ill. Rev. Stat. 1973, ch. 38, par. 114-5. The next day the court ruled initially that the motion was not timely filed within 10 days of being placed on the trial call as provided by statute (Ill. Rev. Stat. 1973, ch. 38, par. 114-5(a)), so as to entitle defendant to an automatic order of substitution of judges, but permitted the motion to be amended as one pursuant to subsection (c), and proceeded to hold a hearing on the merits of the amended motion. Massarella assigns error to the court's initial ruling as to the timeliness of the first motion and its denial of the amended motion.

Section 114-5 of the Criminal Code provides in pertinent part:

> "(a) Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of judge or any 2 judges on the ground that such judge or judges are so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another court or judge not named in the motion.
>
> * * *
>
> (c) [A]ny defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion the court shall conduct a hearing and determine the merits of the motion." (Ill. Rev. Stat. 1973, ch. 38, par. 114-5.)

Early cases interpreting this statute held that to obtain a mandatory substitution of judges under section 114-5(a), a defendant must file a motion alleging prejudice within ten (10) days after the case has been placed on the trial call of the trial judge, and that a case is on the trial call of the trial judge when it is so assigned. (See *People v. Wolfe* (1st Dist. 1970), 124 Ill. App. 2d 349, 354, 260 N.E.2d 424; *People v. Ethridge* (1st Dist. 1966), 78 Ill. App. 2d 299, 302, 223 N.E.2d 437.) However, more recent cases have liberally interpreted this

statute—so as to permit rather than deny a substitution—to hold that such motion is timely filed under this section when filed within 10 days of the date the defendant could be charged with knowledge of the assignment of the case to the trial judge. See *People v. Thomas* (1st Dist. 1978), 58 Ill. App. 3d 460, 462, 374 N.E.2d 795; *People v. Oatis* (1st Dist. 1979), 69 Ill. App. 3d 736, 741, 387 N.E.2d 1052.

Massarella does not contend that he first had knowledge of the assignment of the case to Judge Aspen on July 18, 1973, but rather contends that the motion should have been allowed as of right since it was filed on the first date the case was before Judge Aspen, and before the judge had made any substantive rulings in the case. (*People v. Kostos* (1961), 21 Ill. 2d 451, 173 N.E.2d 469; *People v. Howell* (5th Dist. 1974), 16 Ill. App. 3d 989, 993, 307 N.E.2d 172, *aff'd* 60 Ill. 2d 117, 324 N.E.2d 403; *People v. Evans* (4th Dist. 1971), 1 Ill. App. 3d 158, 273 N.E.2d 71.) It is clear that a motion for the substitution of judges filed after the court has ruled on a substantive issue in the case is untimely because to hold otherwise would allow counsel to first ascertain the attitude of the trial judge on the hearing on that substantive issue, and then to assert the court's adverse judgment on that issue as a ground for allowing the substitution. (See *People v. Chambers* (1956), 9 Ill. 2d 83, 89, 136 N.E.2d 812, *cert. denied*, 359 U.S. 972, 3 L. Ed. 2d 839, 79 S. Ct. 888 (construing Ill. Rev. Stat. 1953, ch. 146, pars. 21, 25, 26 and cited in *Evans* and *Kostos*, *supra*); *Howell*, *supra* at 933.) However, the cases cited by the defendant do not support his argument that the converse of this rule extends the time for filing the motion, *i.e.*, that the motion may be filed at any time, regardless of when the defendant could be charged with knowledge of the assignment of the case to the trial judge, as long as it was filed before a substantive issue had been ruled on.

Relying on *Chambers*, *supra*, and *People v. Norcutt* (1970), 44 Ill. 2d 256, 255 N.E.2d 442, the defendant in *People v. Bean* (1st Dist. 1974), 17 Ill. App. 3d 377, 308

N.E.2d 334, made the same argument that Massarella urges. There, we said:

> "The *Norcutt* and *Chambers* cases are the culmination of a long series of Illinois decisions which by judicial interpretation engrafted an exception onto our present and preceding statutes dealing with mandatory substitution of judges. These cases in effect hold that a motion for a mandatory substitution of judges not only must be made within the time period provided by statute but must also be made prior to the trial court's indicating in any way its views as to the merits of the case. The defendant, by isolating the judicial exception to the time provision of subsection (a), attempts the argument that a restrictive exception to the general rule is in fact a liberalization of it. Such a reading of *Norcutt* and *Chambers* flies in the face of the plain language of the statute. * * * The denial of that portion of the defendant's motion as untimely was fully justified." (*Bean, supra* at 381.)

We agree with the foregoing interpretation of section 114-5(a), and, therefore, find that the denial of Massarella's motion made pursuant to that section was proper.

Alternatively, Massarella contends that the court erred in not granting the motion for cause under section 114-5(c). The defendant contends that the "astronomical figures" involved in the case, the Honorable Samuel B. Epstein's statement in the civil proceeding that he might have granted the defendant's injunction against the Department of Revenue if the state were not a party, and Judge Aspen's prior recusal from a case involving a politically prominent public official and his pending re-election, constituted reasonable grounds not only for the defendant to fear that he could not get a fair trial before Judge Aspen, but also for the judge to grant the motion even if he candidly believed he could and would be fair.

It is clear that the mere fact that the defendant fears that a judge is prejudiced against him is insufficient

cause to grant a motion for substitution. (See *People v. Peter* (1973), 55 Ill. 2d 443, 458, 303 N.E.2d 398, *cert. denied*, 417 U.S. 920, 41 L. Ed. 2d 225, 94 S. Ct. 2627.) The statements attributed to Judge Epstein are not to be found in the record. Nor does the record establish the basis for the alleged "political" theory. The only reference before the court in July 1973 when the motion was denied as to the dollar amounts in issue was that they exceeded $150. Under these circumstances, we find the evidence insufficient to support the defendant's charge of prejudice warranting a substitution of judges.

V.

Massarella next argues that in the course of accepting guilty pleas from three co-defendants prior to trial, the trial judge necessarily heard factual reasons for the pleas which caused a bias and prejudice against him. He therefore contends that the trial judge erred in failing to recuse himself *sua sponte*.

While it cannot be disputed that in a criminal trial a judge's hostile attitude toward the defendant, or his witnesses, is apt to prejudicially influence the jury in arriving at its verdict (see *People v. Marino* (1953), 414 Ill. 445, 111 N.E.2d 534), and that it may be better for a judge to recuse himself when he learns that a plea of guilty has been offered (*United States v. Walker* (D.C. Cir. 1972), 473 F. 2d 136, 138), a trial judge is under no duty to recuse himself even from a bench trial because he presided at the trial of co-defendants (see *People v. Smith* (1965), 32 Ill. 2d 88, 93-94, 203 N.E.2d 879; *People v. Smith* (1st Dist. 1975), 29 Ill. App. 3d 519, 331 N.E.2d 99, *cert. denied*, 424 U.S. 925, 47 L. Ed. 2d 334, 96 S. Ct. 1137 (abst.)), or even because he presided at a prior trial of the same defendant in the same cause (see *United States v. Dichiarinte* (7th Cir. 1971), 445 F. 2d 126, 132).

Moreover, the alleged bias or prejudice of a trial judge to be disqualifying must be shown to have stemmed from an extra-judicial source and result in an opin-

ion on the merits on some basis other than what the judge learned from his participation in the case. (*United States v. Grinnell Corp.* (1966), 384 U.S. 563, 583, 16 L. Ed. 2d 778, 86 S. Ct. 1698.) In the instant case there is no affirmative showing that the trial judge considered information gleaned from the co-defendants' plea hearings during the course of Massarella's trial. (See *People v. Teller* (1st Dist. 1977), 45 Ill. App. 3d 410, 417, 359 N.E.2d 803.) The alleged erroneous rulings and findings made by the trial judge in the course of the trial asserted by Massarella are not in themselves sufficient reasons to believe that the judge had a personal bias or prejudice for or against him (see *United States v. English* (7th Cir. 1974), 501 F. 2d 1254, 1263, *cert. denied*, 419 U.S. 1114, 42 L. Ed. 2d 811, 95 S. Ct. 791), for due process of law is not a guaranty against erroneous rulings or decisions (*People v. Hicks* (1970), 44 Ill. 2d 550, 557, 256 N.E.2d 823, *cert. denied*, 400 U.S. 845, 27 L. Ed. 2d 81, 91 S. Ct. 90). In the absence of any further evidence to support the defendant's charge of prejudice and bias, we cannot say that the trial court erred in failing to recuse himself, or that his failure to do so deprived the defendant of a fair trial in accordance with due process of law.

VI.

In October 1974, three days after several co-indictees and their respective corporations pleaded guilty, Massarella sought to discharge his two privately-retained counsel, Bernard Brody and Sidney Goldstein, who had represented the defendant in the matter since the arraignment in June of 1973. Massarella sought to substitute Junie Sinson, an attorney whom he had first contacted 48 hours before. When Mr. Sinson appeared in court on October 18, 1974, he indicated that due to the complexity of the case he could not substitute unless he were granted a continuance to prepare. Neither Brody nor Goldstein moved to withdraw, moved for a continuance, nor represented to the court that the co-defendants' guilty pleas had so altered the case that

they were not prepared to go to trial. The trial date of October 15, 1974 had been set by the court on May 23, 1974 to enable counsel to prepare for trial, to allow both counsel and the court to clear their calendars, and to enable the state to issue interstate witness subpoenas. In light of these factors the trial court agreed to permit Sinson to file an appearance, but denied his motion for a continuance. Sinson filed no appearance, and Brody and Goldstein continued to represent the defendants throughout the plea negotiations and the trial which began on October 21. The defendant contends that the court, in denying his motion for a continuance and thus preventing the substitution of counsel, deprived him of his constitutional right to the effective assistance of counsel of his choice.

While we do not dispute that the constitutional right to counsel is fundamental and necessarily includes the right to counsel with adequate time to prepare (see *Gideon v. Wainwright* (1963), 372 U.S. 335, 342-43, 9 L. Ed. 2d 799, 83 S. Ct. 792; *People v. Blumenfeld* (1928), 330 Ill. 474, 489, 161 N.E. 857; *People v. Miller* (1st Dist. 1971), 131 Ill. App. 2d 212, 217, 268 N.E.2d 213), the defendant's right to counsel of his own choosing is not absolute, and a substitution of counsel may be denied if it will unduly prejudice the opposing party or interfere with the prompt administration of justice by inordinately delaying the trial (see *People v. McNeil* (1972), 53 Ill. 2d 187, 197-98, 290 N.E.2d 602). Moreover, the granting of a continuance to permit a substitution of counsel for preparation for a case necessarily depends on the particular facts and circumstances surrounding the request, and is a matter resting within the sound judicial discretion of the trial court. (*People v. Surgeon* (1958), 15 Ill. 2d 236, 239, 154 N.E.2d 253; *People v. Clark* (1956), 9 Ill. 2d 46, 49, 137 N.E.2d 54, *cert. denied*, 352 U.S. 1002, 1 L. Ed. 2d 546, 77 S. Ct. 559.) A trial court's refusal to grant a motion for a continuance will ordinarily not be disturbed on appeal without some showing of a clear abuse of discretion. (*People v. Hayes* (1972), 52 Ill. 2d 170, 175, 287 N.E.2d 465; *People v.*

*Brooks* (4th Dist. 1976), 39 Ill. App. 3d 983, 986, 350 N.E.2d 821.) Unless it appears that the refusal to grant a continuance embarrassed the defendant in preparing his defense or prejudiced his rights, the conviction should be affirmed. *People v. Canaday* (1971), 49 Ill. 2d 416, 427, 275 N.E.2d 356; *People v. Allen* (5th Dist. 1976), 35 Ill. App. 3d 342, 347, 341 N.E.2d 431.

The record in the instant case does not reflect that Massarella ever expressed any dissatisfaction with his two privately-retained counsel who had represented him since the inception of the case. Although a large portion of the state's case rested on co-defendant Battersby's testimony who had pleaded guilty to conspiracy to commit theft and to perjury, neither of the defendant's retained counsel asserted at trial that either his plea or his subsequent testimony so altered the case that they were not prepared to proceed. Nor is there anything in the record to support the defendant's fear that his counsel may have inadvertently divulged matters concerning his defense to counsel for the guilty-pleaing co-defendants. On the other hand, given Mr. Sinson's apparent unfamiliarity with this complex trial which the trial court expected to last for over two months, the length of the continuance needed for Mr. Sinson's preparation would have inordinately delayed an already lengthy trial and would have forced the state to re-issue 15 interstate witness subpoenas. Although we recognize that the protection of the defendant's rights are paramount to the efficient administration of justice, we do not believe that the record shows that the defendant's rights were in any way prejudiced by the trial court's denial of the continuance. Therefore, we find no clear showing that the trial court abused its discretion in denying the defendant's motion.

## VII.

Massarella next contends that the trial court erred in denying his motion to sever the perjury counts from the remaining counts for trial pursuant to Ill. Rev. Stat.

1973, ch. 38, par. 114-8. We have previously determined that the trial court did not err in refusing to dismiss the perjury counts. However, Massarella also contends that the joinder of the perjury count with the conspiracy and theft counts (1) eliminated the possibility of his choosing to testify on less than all of the charges (*Cross v. United States* (D.C. Cir. 1964), 335 F. 2d 987); (2) adversely affected the credibility of his testimony due to the fact that the jurors were aware that the grand jury believed he had lied under oath on two previous occasions;[5] and (3) prejudiced his rights due to the fact that the jurors heard evidence of several distinct offenses at a single trial (*United States v. Carter* (D.C. Cir. 1973), 475 F. 2d 349; *Drew v. United States* (D.C. Cir. 1964), 331 F. 2d 85).

As to Massarella's first contention, we note that his severance motions at trial made no reference to a desire to testify on less than all of the charges, or that his testimony on the perjury charge would self-incriminate him on the remaining charges. (*Cf. Cross, supra* at 990.) No need for a severance exists until the defendant makes a convincing showing that he had both important testimony to give concerning one count and a strong need to refrain from testifying on the other counts, because in the absence of such a showing, the court is unable to determine if the claim is genuine and to intelligently weigh the considerations of economy and expedition of judicial administration against the defendant's interest in having a free choice with respect to testifying. (*Baker v. United States* (D.C. Cir. 1968), 401 F. 2d 958, 977, *cert. denied* 400 U.S. 965, 27 L. Ed. 2d 384, 91 S. Ct. 367.) Defendant's failure to specifically set forth this ground for severance before the trial court precludes him from raising it in this court. See *People v. Jackson* (1st Dist. 1972), 4 Ill. App. 3d 698, 702-03, 281 N.E.2d 373.

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[5] Massarella was found not guilty of one charge of perjury.

The defendant cites no authority for his second contention that the trial court's refusal to grant a severance of the charges was prejudicial because the petit jurors were aware that the grand jurors had believed that he had lied under oath on two other occasions. However, this same argument was raised and rejected by the courts in *United States v. Pacente* (7th Cir. 1974), 503 F. 2d 543, *cert. denied*, 419 U.S. 1048, 42 L. Ed. 2d 642, 95 S. Ct. 623, and *United States v. Isaacs* (7th Cir. 1974), 493 F. 2d 1124, *cert. denied*, 417 U.S. 976, 41 L. Ed. 2d 1146, 94 S. Ct. 3183-84. As in *Isaacs*, defendant Massarella voluntarily appeared in the suit instituted by him in which he allegedly gave the perjurious testimony. That testimony related to Massarella's involvement in the scheme to divert tax monies from the state through the sale of untaxed diesel fuel. The perjury, conspiracy, and theft charges all have a logical relationship to that scheme. On the basis of the foregoing cases and facts, we reject the defendant's second contention. See *Pacente*, *supra* at 545-49; *Isaacs*, *supra* at 1159-60.

It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit another crime, from which the jury may infer that the defendant committed the crime charged. (1 Wigmore, Evidence §192-94 (3d Ed. 1940); McCormick, Evidence §157.) The defendant contends that the joinder of the perjury charge with the remaining charges improperly permitted evidence of the former charge to be heard by the jury, and that such evidence prejudiced his rights. However, as stated by the court in *Drew*, *supra*:

> "If, * * *, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, the possibility of 'criminal propensity' prejudice would be in no way enlarged by the fact of joinder. When, for example, the two crimes arose out of a continuous transaction or the same set of events, the evidence would be independently admissible in separate trials." (*Drew*, *supra* at 90.)

Evidence of other crimes is admissible when relevant to prove motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that the proof of one tends to establish the other. (*Drew, supra* at 90.) Massarella instituted the civil proceeding to enjoin the Department of Revenue from investigating his activities and those of BJTS. It is clear from the record of that proceeding that the Department's investigation related to the theft and evasion of state motor fuel tax. It was in that proceeding that Massarella perjured himself when testifying as to the sources of his diesel fuel prior to 1970 and as to his purchase of such fuel through Rella Enterprises. We are of the opinion that this perjurious testimony was admissible to show a particular plan or scheme by which the conspiracy and theft offenses were committed. We also believe that this evidence tends to prove the absence of mistake or inadvertence in committing the subsequent offenses, for if such had been the case Massarella would have had no reason to perjure himself. For the foregoing reasons, we find no error in the trial court's refusal to grant the defendant's motion for severance of the charges.

VIII.

Defendants next contend that they were deprived their constitutional rights to a fair trial in accordance with due process of law and to confront the witnesses against them where the court: (1) limited the evidence sought to be presented by the defense expert witness, (2) excluded evidence of conversations between defendant Massarella and his accountant, (3) applied the best evidence rule to exclude some of the defense's evidence, (4) limited the cross-examination of four of the state's witnesses, (5) allowed into evidence the statements of an alleged co-conspirator, and (6) allowed into evidence the testimony of a deceased witness given at the prior civil proceeding. Having carefully reviewed the record and the authorities cited by the defendants, we find no merit

in these contentions and no necessity to discuss them here.

IX.

The defendants also complain of the prosecutor's reference in his closing argument to the defendants' failure to call two witnesses and the court's ruling on the defendants' objections thereto, of the verdict forms for the theft charges, and of the manner in which the jury was polled.

The record shows that the defendants invited the prosecutor's explanation of the absence of the witnesses and of the defendants' ability to call them. Therefore, we find that the prosecutor's argument was within proper bounds. (See *People v. McElroy* (1964), 30 Ill. 2d 286, 291-92, 196 N.E.2d 651; *People v. Wheeler* (1955), 5 Ill. 2d 474, 485-86, 126 N.E.2d 228.) Furthermore, the verdict form proffered by the state, without objection by the defendants, was I.P.I. Criminal Instruction No. 26.05. Since Supreme Court Rule 451 (Ill. Rev. Stat. 1973, ch. 110A, par. 451) prescribes the use of the applicable I.P.I. criminal instruction where possible, we find no merit in the defendants' second complaint. (See *People v. Padget* (3rd Dist. 1974), 21 Ill. App. 3d 426, 430, 315 N.E.2d 646.) Finally, there is nothing in the record to show that the defendants or their attorneys objected at trial to the manner in which the jury was polled, or sought a more extensive poll. Moreover, the juror's responses indicate that there was no hint of dissent from the verdicts, although the questions posed to the jurors gave them ample opportunity to do so. Under these circumstances, we do not believe the trial court abused its discretion in polling the jury as it did.

X.

Illinois Revised Statutes 1973, ch. 38, par. 1005-4-1 states in pertinent part:

"(a) After a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall:

* * *

(3) *consider* evidence and information offered by the parties in aggravation and mitigation; * * *." (Emphasis added.)

On January 8, 1975, following the jury's finding of guilt, the trial court held a hearing on aggravation and mitigation in which defendant Massarella presented evidence in mitigation. At the conclusion of the hearing, the trial judge presented counsel with a lengthy written sentencing memorandum order dated January 8, 1975. Defendant Massarella now contends that due to the alleged prior preparation of the sentencing order, the trial court did not consider the evidence presented in mitigation by the defendant.

At the outset we note that Massarella failed to object to this procedure in the trial court. Therefore, he is deemed to have waived his right to assert any prejudice on appeal. (See *People v. Dixon* (1st Dist. 1971), 2 Ill. App. 3d 279, 284, 276 N.E.2d 42.) However, even assuming that defendant's argument was properly before this court, our review of the record does not persuade us that the trial court did not in fact consider the evidence presented in the hearing on mitigation. During the hearing the trial judge stated that he had considered carefully letters of recommendation and had reviewed carefully the background of the defendant which he gleaned "not only during the course of the trial but also as part of the pre-sentence reports as part of Mr. Rocco's hearing presentation on mitigation." The order contains a thorough, reasoned statement of the sentences as to each defendant and the grounds for them. Handwritten additions and changes were made on the order. The defendant has presented no other evidence, other than the date on the order, to support his contention

that the trial judge did not consider the evidence in mitigation. Under these circumstances, we find no basis to support his contention.

XI.

For the crime of theft, Massarella was sentenced to five years probation, two years periodic imprisonment, the payment of a $10,000 fine, and the payment of $427,407 restitution to the State of Illinois. He was ordered to serve his sentence of periodic imprisonment in the Cook County Department of Corrections where he was to be incarcerated, "provided that he may be released for short periods of time on petition of this Court in order that he may take steps to facilitate the restitution terms of this order." Massarella was further ordered to commence immediately to sell his business assets in order to pay the restitution and fine. Massarella contends that (1) his sentence of two years periodic imprisonment as a condition of five years probation was an impermissible imposition of two years incarceration, and (2) that under Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-1 periodic imprisonment could not be imposed along with an indeterminate penitentiary sentence of one to three years for perjury.

As to the defendant's first contention, it is clear that the trial court had the authority to require Massarella to serve a term of periodic imprisonment as a condition of probation. (See the Unified Code of Corrections (UCC), Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-3(b)(1).) A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night, or for periods of days, or both. (UCC, sec. 1005-7-1-(a).) Such a sentence of periodic imprisonment may be imposed to permit the defendant to conduct a business or for any other purpose determined by the court. (UCC, sec. 1005-7-1(b)(3)(7).) We find the trial court's sentence of periodic imprisonment to be consonant with the foregoing provisions of the UCC.

Section 5-7-1 follows and expands the former work release statute for Illinois jails. (Ill. Rev. Stat. 1971, ch. 75, pars. 35 to 41 (repealed); see Council Commentary, Ill. Rev. Stat. 1973, par. 1005-7-1.) While under the former law only misdemeanants were allowed work release status, subparagraph (c) of section 5-7-1 also permits periodic imprisonment to be imposed for a felony. Subparagraph (c) also provides that, "The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant." Without other citation of authority, the defendant contends that this section of the Code precludes the imposition of periodic imprisonment for the offense of theft in addition to the indeterminate penitentiary sentence of one to three years for the offense of perjury. We disagree.

Although our research has revealed no cases dealing with this precise issue, several other sections of the Code persuade us that the defendant's construction of section 5-7-1 is erroneous. Section 5-7-2 dealing with the modification and revocation of a sentence of periodic imprisonment provides that:

> "That part of the term under paragraph (d) of Section 5-7-1 which has been served under the sentence of periodic imprisonment shall be credited against a sentence of imprisonment." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-2.)

Moreover, section 5-7-8 provides that:

> "(a) The service of an indeterminate sentence of imprisonment shall satisfy any sentence of periodic imprisonment which was imposed on an offender for an offense committed prior to the imposition of the indeterminate sentence. An offender who is serving a sentence of periodic imprisonment at the time an indeterminate sentence of imprisonment is imposed shall be delivered to the custody of the Department of Corrections to commence service of the indeterminate sentence immediately." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-8.)

These sections of the Code allowing the crediting and merger of a periodic sentence of imprisonment into a sentence of imprisonment suggest to us that the imposition of a sentence of periodic imprisonment for one offense and a sentence of imprisonment for another distinct and separate second offense is permissible. Therefore, we believe that section 5-7-1(c) must be construed only to preclude the imposition of a sentence of periodic imprisonment and a sentence of imprisonment for a single offense. Since in the instant case the sentence of periodic imprisonment was imposed as a condition of probation for the offense of theft and the indeterminate penitentiary sentence of one to three years was imposed for the defendant's perjury conviction, we find section 5-7-1(c) inapplicable and the defendant's argument without merit.

XII.

Defendant Massarella urges that the trial court was without authority to order restitution of $425,407 as a condition of his probation for theft, and that his one to three year penitentiary sentence for perjury was excessive and inconsistent considering his background and the sentence of three years conditional discharge and $1,000 fine imposed on co-defendant Battersby upon his plea of guilty to perjury.

As to Massarella's first contention, we find his reliance on federal income tax evasion cases misplaced insofar as he was convicted of theft, not tax evasion. Moreover, section 5-6-3(b)(10) of the UCC expressly empowers the court to make as a condition of probation the "restitution or reparation in an amount not to exceed actual loss or damage to property and pecuniary loss * * * [and to] determine the amount and conditions of payment." A review of the record and exhibits introduced shows that the amount of disputed tax monies was subject to accurate computation and that the evidence supported the specific amount of restitution ordered.

Massarella was sentenced to one to three years in the penitentiary and fined $10,000 for perjury while co-defendant Battersby received a sentence of three years conditional discharge and a $1,000 fine. Massarella contends that this disparity of the sentences imposed demonstrates that he was punished for proceeding to trial rather than joining Battersby in his guilty plea. We find this claim without merit.

A reviewing court should not disturb a sentence within the statutory range on the mere allegation that it was imposed because a defendant demanded a trial. (*People v. Perry* (1971), 47 Ill. 2d 402, 408, 266 N.E.2d 330.) That fact must be clearly established by evidence and should not be inferred merely because a defendant received a higher sentence than a defendant who pleaded guilty. (*People v. Perry, supra* at 408-09.) Mere disparity between the sentences imposed on Massarella, who stood trial, and Battersby, who pleaded guilty, does not of itself require action by this court. (See *People v. Martin* (1970), 47 Ill. 2d 331, 339, 265 N.E.2d 685, *cert. denied*, 403 U.S. 921, 29 L. Ed. 2d 700, 91 S. Ct. 2240.) It is the reason for the disparity that is controlling. *People v. Martin, supra.*

A disparity in sentences is appropriate where the defendant receiving the more severe sentence was the moving force in the commission of the crime. (See *People v. Martin, supra.*) Both Massarella and Battersby were convicted of perjury for their testimony in the injunction suit initiated by BJTS of which Massarella was president and the sole shareholder. Massarella testified without subpoena and his testimony extended over four days and consumed nearly one-half of the entire hearing. On the other hand, Battersby testified only briefly after being subpoenaed by Massarella's attorney. Thus, we conclude that Massarella was the moving force in the commission of the crimes of perjury.

Moreover, it is proper for a trial court to grant leniency in sentencing a defendant who by his plea ensured prompt and certain application of correctional

measures to him, acknowledged his guilt and showed a willingness to assume responsibility for his conduct, and cooperated in the successful prosecution of other offenders. (See A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, secs. 1.8(a)(i), (ii), (v); *cf. People v. Sivels* (1975), 60 Ill. 2d 102, 105, 324 N.E.2d 422.) A review of the record shows that Battersby satisfied these criteria, and, therefore was properly afforded a more lenient sentence.

Finally, defendant's reliance on *People v. Moriarty* (1962), 25 Ill. 2d 565, 185 N.E.2d 688 is misplaced. In *Moriarty*, the court held that a criminal defendant should not be punished by a heavy sentence merely because he exercised his constitutional right to a trial. With this holding we agree. However, there the trial judge in imposing a heavier sentence expressly stated that he intended to punish the defendant's insistence on a trial. In the instant case, no such prejudice was claimed by Massarella, and the trial court imposed the minimum penitentiary sentence for perjury after careful consideration of the defendant's background. We are of the opinion that the trial court's action was proper.

XIII.

For the crime of theft BJTS was fined $10,000 and ordered to pay $425,407 in restitution less the $100,000 paid by Battersby and Mid-Town Petroleum, Inc. For the crime of conspiracy to commit theft, Mideast received the same sentence. The corporate defendants and Massarella were held jointly and severally liable for the payment of restitution.

A corporation may be ordered to pay restitution in addition to a fine only as a condition of conditional discharge. (See Ill. Rev. Stat. 1973, ch. 38, pars. 2-15, 1005-5-3(f)(1), 1005-6-3(b)(10), and 1005-9-1(b).) At the outset we note that section 5-5-3(a) provides that "[e]very person convicted of an offense shall be sentenced as provided in this Section." However, the UCC contains no definition of the word "person." The UCC is a part of

chapter 38 of our statute and is identified as "Criminal Law and Procedure." Section 2-15 of chapter 38 contains the following definition of the word "person":

> "'Person' means an individual, public or private corporation, government, partnership, or unincorporated association."

It is obvious to us that the legislature in using the word "person" in the UCC was mindful of the definition in section 2-15 and considered that in using the word "person" in the UCC. In any respect the defendant has not raised this point on appeal.

In the instant case the trial court did not sentence either corporation to a period of conditional discharge. Therefore, the restitution order was imposed in a manner which did not conform to the statute. Accordingly, the sentences of BJTS and Mideast are hereby vacated and the cause remanded to the trial court for resentencing as to these corporate defendants.

For the reasons set forth herein, the judgment of the circuit court of Cook County is affirmed in part and reversed and remanded in part.

Affirmed in part; reversed and remanded in part.

STAMOS, P.J., and PERLIN, J., concur.

# APPENDIX D

## IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES ex rel.,
BENEDETTO J. MASSARELLA,

*Petitioner-Appellant,*

No. 81-1571 vs.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

*Respondents-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 81 C 1752
Honorable **Nicholas J. Bua**, Presiding

## PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC.

### INTRODUCTION

Petitioner-appellant, Benedetto J. Massarella (hereafter, defendant) was found guilty by an Illinois State court jury of theft and perjury for which he was sentenced to 5 years' probation, including 2 years' periodic imprisonment, for the theft, and 1 to 3 years' imprisonment for perjury, the sentences to run concurrently. A fine and a restitution order also were imposed.[1]

[1] The Panel was unable to determine from the present record, including the State court opinions, what fine was imposed for what offense. (See Sl. Op. p. 2 & fn. 1.)

(Footnote continued on following page)

After exhausting his State remedies, (see citations in the Panel's Slip Opinion, [hereafter, Sl. Op.], p. 2, fn. 1), defendant applied for a writ of habeas corpus;[2] from denial of the petition, this appeal followed.

On July 14, 1982, a panel of this Court reversed and remanded, with directions that the District Court (1) determine whether defendant was fined $10,000 for perjury,[3] and (2) remand to the state court "'to permit the state court to apply, if possible, the law in place when the crime occurred.'"[4]

**Prefatory Statement**

In a somewhat strange opinion, a Panel of this Court has agreed that defendant's perjury conviction violates the *ex post facto* clause, yet has remanded for resentencing under the provisions in effect at the time of the offense.

This Petition is timely filed* pursuant to F.R.App.P. 40, and defendant's suggestion for rehearing in banc is contained herein as permitted by F.R.App.P. 35(b).

---

[1] *continued*

For the Court's information, a $10,000 fine was part of the sentence imposed on the perjury charge. (R. 337 [ref. to State court record]).

[2] In his habeas petition, defendant contended that the perjury conviction was obtained in violation of the *ex post facto* prohibition of the Constitution, and that all the convictions were constitutionally void for various Sixth Amendment violations involving improper limitations of cross-examination and of presentation of defense evidence. He also contended that no reviewing court had yet given anything but the most perfunctory consideration to the constitutional issues other than the *ex post facto* issue—a complaint that still holds true, considering the cursory manner by which the Panel disposed of these viable, serious issues. (See Sl. Op. p. 5.)

[3] "If so, this fine would, under the principles noted above [in the Panel's opinion], be an *ex post facto* violation." (Sl. Op. p. 5.) See fn. 1, *supra*.

[4] Sl. Op. p. 5, quoting from *Weaver v. Graham*, 450 U.S. 24, 36-37 n.22 (1981).

* Per order of Court extending the time of August 20, 1982 within which to file this Petition.

While it is our position that the entire conviction is void for the constitutional violation, accepting *arguendo* that only the sentence need be altered, to apply "the law in place when his crime occurred," (Sl. Op. p. 5), would be to sentence defendant under the law under which he elected *not* to be sentenced. (Sl. Op. p. 3; text accompanying fn. 3.)

How can defendant, consistent with the most rudimentary constitutional rights, now be sentenced under the law under which he elected *not* to be sentenced, as a result of having successfully challenged the conviction? Such a hybrid end result in effect permits the State to have its proverbial cake and eat it, too. Rehearing, or rehearing in banc, is appropriate so that this Court may properly decide the seminal issue how to remedy the constitutional violation which admittedly occurred here. In light of defendant's trial-time election, we submit that the remedy suggested by *Weaver v. Graham, supra* fn. 4, quoted in Sl. Op. p. 5, is entirely inappropriate and unconstitutional in this case.

Moreover, though the Panel agrees an *ex post facto* violation occurred, it so holds only with respect to the reclassification of the offense, (Sl. Op. pp. 3-5), not with respect also to the extension of the statute of limitations so as to permit prosecution *at all* within the time-sequence of events at bar. (Sl. Op. p. 3; the chronology is set out in *id.* pp. 2-3.) We urge rehearing as to the full scope of defendant's *ex post facto* argument; a more sensible approach would result in vacature of the perjury conviction entirely and would avoid the troublesome resentencing imbroglio.

Pursuant to the criteria set out in Rules 35(b) & 40, rehearing, or rehearing in banc, should be allowed, for the reasons which follow.

## ARGUMENT

1.

**The Panel's "end result" on the ex post facto issue—that is, that defendant be resentenced under the "old law"—does not go far enough; rather, the conviction for perjury should be vacated, because on the facts of this case, extension of the statute of limitations based on the reclassification of the offense from an "indictable misdemeanor" to a felony unconstitutionally subjects defendant to ex post facto legislation. The decision to resentence defendant under the old law relies on inapposite authority which actually redounds in defendant's favor, and unconstitutionally directs that he be sentenced contrary to a binding election he was required to make in the trial court.**

In the State courts and in this appeal, defendant argued, not only that his felony conviction for perjury violated the *ex post facto* clause (U.S. Const. Art. I, sec. 10, cl. 1) because of the reclassification of the offense from an "indictable misdemeanor" to a felony, (Sl. Op. pp. 3-5), but also that the extension of the statute of limitations—a direct consequence of said reclassification—so as to permit his prosecution for perjury at all, violated the *ex post facto* clause. (Sl. Op. pp. 2-3)

The Panel's determination that extension of the limitations period—a result which was a direct consequence of the reclassification—does not run afoul of the Constitution, (Sl. Op. p. 3), does violence to law, logic and defendant's rights. Even if, in the abstract, extension of a limitations period does not necessarily violate the *ex post facto* prohibition, on the facts of *this* case, such extension *does* violate the prohibition. Having decided that reclassification of the perjury offense to a felony was constitutionally barred because of adverse consequences which accrue to felonies which do not accrue to misdemeanors, (Sl. Op. pp. 3-5), rationally the Panel should have concluded further that, since extension of the limitations period—undisputedly, a direct product of

the reclassification—was just such an adverse consequence, the extension, too—but for which the perjury offense could not have been prosecuted—violated defendant's right not to be subjected to *ex post facto* legislation. Since in this case, extension of the limitations period was a direct consequence of the unconstitutional reclassification, this consequence is prohibited by the *ex post facto* clause.

Under the former and revised laws of Illinois, the reclassification of the offense caused defendant to be subject to a harsher penalty; the possible minimum sentence was thereby increased. When perjury was a misdemeanor, it was within the court's discretion to impose a sentence as miniscule as a day in jail or a one-cent fine; while as a felony, if a sentence of imprisonment was imposed, it had to be at least 366 days. By thus increasing the possible minimum incarceration sentence, the reclassification renders unconstitutional the statutory scheme as applied to defendant. *Lindsey v. Washington*, 301 U.S. 397, 402 (1937) (*ex post facto* clause "looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed."); *accord*, *People v. Wyckoff*, 106 Ill.App.2d 360, 245 N.E.2d 316 (2 Dist. 1969) (amendment increasing possible minimum sentence, invalid as *ex post facto* law).

Because of these factors over and above the collateral consequences recognized by the Panel (license limitations, civil rights, etc.) which accrue to felonies as opposed to misdemeanors—that is, the extension of the statute of limitations, and the subjection of defendant to a greater minimum sentence—the Panel's decision that defendant be resentenced under the old law is not a satisfactory remedy from a constitutional viewpoint.

* * *

The decision to resentence defendant under the law in effect at the time of the offense is entirely unsatisfactory for two additional, independent reasons.

First, in reaching this unique and, in our view, unsupportable conclusion, the Panel has relied upon inapposite authority which, on closer scrutiny, redounds to defendant's benefit. Secondly, this selection of remedy places defendant in the constitutionally impermissible position of being resentenced under the very law he had elected not to be sentenced under, when made to choose in the trial court. (See Tr. 2295-97, 2302.)

While acknowledging that "The matter of remedies is a difficult one in this case," (Sl. Op. p. 5), the Panel rejects defendant's argument that the conviction is wholly invalid and should be vacated, directing that he be resentenced under the old law on the basis of the following authority, set out herein in its entirety:

> "Massarella seeks an unconditional writ that would have the effect of vacating his perjury conviction. The Supreme Court, however, has noted that '[t]he proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when the crime occurred.' *Weaver v. Graham*, *supra*, 450 U.S. at 36-37 n.22." (Sl. Op. p. 5)

*Weaver v. Graham*, *supra* fn. 4, does *not* involve a sentencing determination; rather, it deals solely with the method of computing "good time" while in prison. The Court held that the revised law, which resulted in more lengthy incarceration than the prior law, was "void as applied to petitioner, whose crime occurred before its effective date." 450 U.S. at 36. It is one thing to compute "good time" in accordance with one formula or another: it is quite another to apply judicial sentencing discretion under two different laws. *Weaver v. Graham's* footnote 22, quoted and exclusively relied on by the Panel, should not, therefore, be deemed controlling on the admittedly "difficult" matter of remedies.

Nor do the cases cited in the *Weaver* footnote support the Panel's decision. Both *Lindsey v. Washington*, *supra*, and *Ex Parte Medley*, 134 U.S. 160 (1890), hold it is a

question of State law for the State courts whether the "old" law still may be imposed after the Court had ruled the "new" law void for violation of the *ex post facto* clause; as the Court put it in *Medley*—a capital case wherein the result in defendant's favor not only relieved him of the supreme penalty but even ordered his discharge from custody:

> "[I]t is apparent that while the Statute under which he is now held in custody is an *ex post facto* law in regard to his offense, *it repeals the former law*, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted on by the court below, and it is neither our inclination nor our duty to decide what the [state] court may or what it may not do in regard to the case as it stands." *Id.* at 174. (Emphasis added.)

Under this rationale, the passage of the new law operated to repeal the old law, so that it is not now possible to sentence defendant Massarella under the old law.

Secondly, defendant was made to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97, 2302) He chose the new law. (See Sl. Op. p. 3, fn. 3.) The Panel's decision, requiring that he be resentenced under the old law, cannot be carried out without doing grave violence to defendant's most basic constitutional rights. Even though the Panel specifically admonishes that no "more onerous sentence" be imposed, (Sl. Op. p. 5), the constitutionally-required standard is *not* the sentence *actually* imposed, but rather, the sentence which theoretically *could be* imposed:

> "But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Lindsey v. Washington, supra*, 301 U.S. at 402.

* * *

We stress that the Panel's decision acknowledges the *ex post facto* nature of the proceedings, particularly in its statement that, if defendant was fined $10,000 for his perjury conviction,[5] "this fine would, under principles noted above, be an *ex post facto* violation." (Sl. Op. p. 5) It makes no sense to attempt to salvage, in piecemeal fashion, this unconstitutionally wrought perjury conviction which is defective in each of the aspects above set forth.

For the foregoing reasons, rehearing, or rehearing in banc, should be allowed for a more rational resolution of the serious and meritorious *ex post facto* issues raised in the appeal and expanded in this Petition. It is not seemly for this convoluted and confusing decision to stand as the law of this Circuit on such a crucial question of federal constitutional law.

2.

**Other issues of constitutional dimensions were summarily dismissed by the Panel. The reasons, therefor, were not explicated.**

We also seek rehearing upon the additional serious constitutional issues raised in the habeas petition—matters of Fourteenth Amendment due process by way of Sixth Amendment violations of defendant's rights to confrontation and to present defense evidence. Like the State reviewing courts, the Panel has not deigned to eludicate any opinion thereon, choosing instead merely to reject them out of hand. (See Sl. Op. 5, final paragraph; see also Sl. Op. p. 1). In the interest of furthering respect for the appellate system, the Panel should—at the very least—express its reasons for concluding that these issues are not "of moment." (Sl. Op. p. 1)

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[5] As he was. See fn. 1, *supra*; R. 337 (State court).

## CONCLUSION

For the foregoing reasons, rehearing or rehearing in banc should be allowed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
*Attorneys for Appellant*

# APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

U.S., *ex rel.*,
BENEDETTO J. MASSARELLA,

*Petitioner-Appellant,*

No. 81-1571 vs.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

*Respondents-Appellees.*

## MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

COMES NOW Petitioner-Appellant, Benedetto J. Massarella, and moves for an Order staying the mandate pending his Petition for a writ of certiorari to be filed with the United States Supreme Court, in support of which there is attached the affidavit of undersigned counsel. This Motion seeks a recall of the mandate issued on 10-1-82.

/s/ JULIUS LUCIUS ECHELES,
Attorney for Petitioner-Appellant

35 East Wacker Drive
Chicago, Illinois 60601
312/382-0711

## AFFIDAVIT

JULIUS LUCIUS ECHELES, being first duly sworn on oath, deposes and states:

1. That I am the attorney who is processing the appeal of Appellant Massarella.

2. The single issue in this cause is whether or not the constitutional prohibition against the ex post facto laws is applicable in accordance with Article 1, Sec. 10, Cl. 1 of the United States Constitution.

3. In this Court's opinion *your Honors* have agreed that Appellant's stay conviction violated the ex post facto laws (Sl. Op. pp. 3-5).

4. Uniquely, the Attorney General also moved for a Petition for a Rehearing, but the same was denied—as was Appellant's.

5. The issue is of constitutional import (*Lindsey v. Washington*, 301 U.S. 397, 402; *Weaver v. Graham*, 450 U.S. 24, 36-37, n.22.

6. The sentence imposed by the State Court, (which is being challenged because of its unconstitutional feature) is 1-3 years.

7. In this Court's Order of July 14, 1982 the State sentence was reversed and remanded. The sentence appealed from was 1-3 years.

8. If re-sentence time comes at the State level, Petitioner may not be sentenced to any greater term. But considering that Appellant's sentence was imposed eight years ago, and Appellant has had no brush with the law since, and is and has been gainfully employed in operating a musical radio program, and lives with his wife at the same address, the real likelihood is that any sentence that may be re-imposed would be less than the previous sentence made although Appellant would argue that no sentence at all could be imposed.

9. It is for this additional reason, that the mandate should be stayed until the Supreme Court rules on Appellant's *certiorari* Petition.

/s/ JULIUS LUCIUS ECHELES

SUBSCRIBED and sworn to before me
this _____ day of October, 1982

_____
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the within Motion by delivering same on October 6th, 1982 to James E. Gildea, Special Assistant Attorney General, 401 North Michigan Avenue, Chicago, Illinois 60611, Attorney for Respondents-Appellees.

/s/ JULIUS LUCIUS ECHELES

# APPENDIX F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPT. CRIMINAL DIV/DISTR Pleas, Proceedings and Judgments, before the Circuit Court of Cook County, Illinois located at 2600 S. CALIFORNIA, Illinois, Branch ——— on 1/8/75

Present: Honorable MARVIN ASPEN One of the Judges of the Circuit Court of Cook County

Attest: Morgan M. Finley, Clerk

BERNARD CAREY, States Attorney
RICHARD J. ELROD, Sheriff

---

THE PEOPLE OF THE STATE OF ILLINOIS

(Plaintiff)

v. BENEDETTO J. MASSARELLA (IMPLEADED)

(Defendant)

Indictment or Case # 73-1758

CONSPIRACY, PERJURY, THEFT, AND TAX EVASION

CHARGE: Chapter 38 Section 32 Paragraph 02 of the Illinois Revised Statutes.

The Offense of Perjury, IN MANNER AND FORM AS CHARGED IN THE INDICTMENT.

---

The defendant was represented by an attorney.

The court adjudged defendant guilty on the Verdict.

The following sentence is not a condition of probation.

(Enter the sentence in the appropriate paragraph 1 or 2 below)

TO THE ADULT DIVISION:

BECAUSE OF THE JUDGMENT OF GUILTY IT IS ORDERED THAT

1. THE DEFENDANT BENEDETTO J. MASSARELLA (IMPLEADED) is sentenced for the INDEFINITE TERM of XXX or the term of not less than ONE YEAR nor more than THREE YEARS and committed to the custody of the Adult Division of the Department of Corrections for confinement in the ILLINOIS DEPARTMENT OF CORRECTIONS.

The SHERIFF OF COOK COUNTY is commanded to take the defendant BENEDETTO J. MASSARELLA (IMPLEADED) into his custody and deliver (him) (her) to the aforesaid Department of Corrections.

The DEPARTMENT OF CORRECTIONS is commanded to take the defendant BENEDETTO J. MASSARELLA (IMPLEADED) and confine (him) (her) in the manner provided by law until the above sentence is fulfilled.

[Circuit Court Clerk's Certification as to Correctness omitted in printing.]

# APPENDIX G

## EXCERPT OF COUNT THREE OF INDICTMENT

Count: 3: The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that:

Benedetto J. Massarella has, from on or about August 26, 1971, to on or about August 30, 1971, in the County of Cook and State of Illinois, committed the offense of

PERJURY

in that he, under oath in a proceeding where by law such oath was required, to wit: in a proceeding entitled *Bee Jay's Truck Stop, Inc. vs. Illinois Department of Revenue*, Case Number 71 Ch 3608, before Judge Samuel B. Epstein in the Circuit Court of Cook County, County Department, Chancery Division, in the First District of the State of Illinois, made the following false statements, material to the issue or point in question, which he did not believe to be true:

* * *

All in violation of Illinois Revised Statutes, 1970, Chapter 38, Section 32-2.

# APPENDIX H

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 23, 1982.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN W. PECK, Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

---

UNITED STATES OF AMERICA ex rel.
BENEDETTO J. MASSARELLA,

*Petitioner-Appellant,*

No. 81-1571 *vs.*

RICHARD J. ELROD, Sheriff of Cook County, Illinois and TYRONE FAHNER, Attorney General of Illinois,

*Respondents-Appellees.*

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 1752—Nicholas J. Bua, *Judge.*

---

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *in banc* filed by the Respondents-Appellees and by the Petitioner-Appellant.

---

* The Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals is sitting by designation.

On consideration of the petitions, all members of the original panel having voted to deny a rehearing, and no judge in regular active service having requested a vote thereon, accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be and the same are hereby, DENIED.

Office-Supreme Court, U.S.
FILED
FEB 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-811

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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TYRONE C. FAHNER, Attorney General, State of Illinois,

*Petitioner,*

vs.

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,

*Respondent.*

---

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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## RESPONDENT'S BRIEF IN RESPONSE

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1982

## No. 82-811

**TYRONE G. FAHNER, Attorney General, State of Illinois,**

*Petitioner,*

vs.

**UNITED STATES ex rel. BENEDETTO J. MASSARELLA,**

*Respondent.*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

## RESPONDENT'S BRIEF IN RESPONSE

### Prefatory Statement

Respondent, Benedetto J. Massarella (hereafter, defendant, or Massarella) hereby submits this, his Response to the Petition of Tyrone C. Fahner for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, stating that he AGREES that this Court should review the decision of the Court of Appeals reversing the District Court's order denying his (Massarella's) Petition for a Writ of Habeas Corpus and remanding with

certain directions, specifically, that he be resentenced by the State Court pursuant to the law existing at the time of the offense.

* * *

The Opinion sought to be reviewed via the above-captioned Petition for Certiorari is the same as that sought to be reviewed via the separate Petition for Certiorari, timely filed by Massarella as Petitioner, presently pending in this Court as No. 82-844, entitled *United States ex rel. Benedetto J. Massarella, Petitioner, vs. Richard J. Elrod, Sheriff of Cook County, et al., Respondents.*

By letter from the Clerk of this Court, Massarella was requested to file a Response to Petition No. 82-811 on or before February 19, 1983. In addition to the following material, Massarella hereby adopts and incorporates by reference herein, as if fully set forth, his Petition No. 82-844, presently pending and on file with this Court, as part and parcel of his Response herein.

## OPINIONS BELOW

The Opinion sought to be reviewed in both Nos. 82-811 and 82-844 is the decision of the Court of Appeals for the Seventh Circuit in *United States ex rel. Benedetto J. Massarella* v. *Richard L. Elrod, Sheriff of Cook County, Illinois and Tyrone Fahner, Attorney General of Illinois,* No. 81-1571, decided July 14, 1982. This decision, reported at 682 F.2d 688, is contained as App. A (p. 5a) in Petition No. 82-811, and as App. A (p. App. 1) in Petition No. 82-844.

The Seventh Circuit's Opinion reversed and remanded (with directions that petitioner be resentenced by the State Court pursuant to the laws in effect at the time of the offense) a decision of the United States District Court

for the Northern District of Illinois in *United States ex rel. Massarella* v. *Elrod, et al.*, No. 81 C 1752, dated April 7, 1981, reported at 510 F.Supp. 1082. The District Court's Order is contained as App. B (p. 3b) in Petition No. 82-811, and as App. C (p. App. 9) in Petition No. 82-844.

Before filing the habeas corpus petition which is the subject of the instant proceedings (that is, both 82-811 and 82-844) presently pending in this Court, Massarella had exhausted his State remedies.[1]

While the instant proceedings were pending in federal court, Massarella filed in the State trial court a Petition treated by that court as one brought under the Illinois Post-Conviction Hearing Act, Chap. 38, sec. 122 et seq., Ill.Rev.Stat. In the Brief in Opposition filed by Tyrone Fahner for the Respondents in this Court in Petition No. 82-844 (*i.e.*, the Petition for Certiorari wherein Massarella is Petitioner), the following statement is contained at p. 2:

> "Those proceedings [*i.e.*, the State post-conviction proceedings] terminated with the trial court denying

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[1] On Massarella's original, direct appeal in the State courts, the Appellate Court agreed that the indictment should have been dismissed due to improper participation of the Attorney General and reversed without deciding the remaining issues. *People* v. *Massarella*, 53 Ill.App.3d 774, 10 Ill.Dec. 912, 368 N.E.2d 507 (1 Dist. 1977). The Illinois Supreme Court allowed the State's petition for leave to appeal, reversed that decision, and remanded to the Appellate Court for resolution of the remaining issues *People* v. *Massarella*, 72 Ill.2d 531, 21 Ill.Dec. 898, 382 N.E.2d 262 (1978).

In its second opinion, the Appellate Court resolved all issues against defendant, *People* v. *Massarella*, 80 Ill.App.3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1 Dist. 1979). Leave to appeal was denied by the Illinois Supreme Court, and this Court denied defendant's petition for certiorari. *People* v. *Massarella*, 81 Ill.2d 586 (1980); *Massarella* v. *Illinois*, 449 U.S. 1077 (1981).

relief and the Illinois Appellate Court dismissing an appeal therefrom in an unreported order."

While it is true that the trial court denied relief and that the Appellate Court dismissed the appeal therefrom, No. 82-1348,[2] it is not correct that these orders "terminated" those post-conviction proceedings; for on January 4, 1983, Massarella timely filed his petition for leave to appeal in the Illinois Supreme Court, No. 57757, which petition is presently pending in that Court.[3]

## JURISDICTION

We concur that this Court has jurisdiction over the instant Petition for the reasons set out at p. 3 of the Petition (as well as for the reasons set out at p. 2 of the Petition in No. 82-844).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are adequately set forth at pp. 3-6 of the Petition (and at pp. 2-3 of the Petition in No. 82-844), and are not repeated here to avoid unnecessary duplication.

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[2] The Appellate Court's order dismissing the appeal was not based on the merits, but, rather, was in response to the State's motion to dismiss the said appeal as "moot" on the basis of the very Court of Appeals decision at issue in the present proceedings pending in this Court on the separate petitions for certiorari, to wit, Nos. 82-811 and 82-844.

[3] One of the bases for Massarella's pending Petition for Leave to Appeal from the order dismissing his appeal is that the Seventh Circuit's opinion did *not* finally resolve all the issues raised in the State post-conviction proceedings; and we have pointed out to the Illinois Supreme Court in the Petition pending before it that both Massarella and the State have separately sought review in this Court from the said Seventh Circuit decision.

## RESPONSE TO PETITION FOR CERTIORARI

For the reasons set forth in our Petition, No. 82-844,[4] as well as for the reasons set forth below, we agree that Certiorari should be allowed to review the decision of the Court of Appeals for the Seventh Circuit herein at issue.

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[4] The "Questions Presented" by Pet. No. 82-844, are as follows:

"1. On appeal from the District Court's denial of petition for writ of habeas corpus: where the Court of Appeals reversed, ruling that the State's reclassification of perjury from a misdemeanor to a felony, after commission of the act for which petitioner was charged, violated his federal constitutional rights under the *ex post facto* clause* because of adverse collateral consequences accruing to felonies but not to misdemeanors, did the Court of Appeals correctly further determine:

(A) that while the said retroactive transformation as to the nature of the offense violated the *ex post facto* clause, the resultant extension of the statute of limitations—a direct consequence of the said reclassification—was nonetheless constitutionally permissible?

(B) that the conviction itself need not be vacated, ruling the sufficient remedy for the *ex post facto* violation was to remand to the District Court with instructions that the cause be remanded to the state court for resentencing under the law in effect at the time of the offense—though petitioner had elected not to be sentenced thereunder?

2. In reaching these results upon the undisputed facts, did the Seventh Circuit misconstrue and misapply *Weaver* v. *Graham*, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that decision?"

"* 'We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause.' (App. A, p. 5; Sl. Op. p. 5." [682 F.2d at 690]

As framed in the instant Petition (No. 82-811), the "Question Presented for Review" is as follows:

> "Whether the opinion of the court of appeals holding that a habeas corpus petitioner's voluntary election to be sentenced under a statute enacted after his offense violates the *ex post facto* clause conflicts with this Court's decisions in *Francis* v. *Henderson, Wainwright* v. *Sykes,* and *Engle* v. *Isaac.*" (Pet. for Cert. No. 82-811, p. i)

The so-called "voluntary election" creates an indefensible and unsupportable conundrum, and is indeed not a constitutionally valid "election" at all—as is argued in the still-pending State post-conviction proceedings.[5]

Massarella was forced to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97; 2303 [State Trial Transcript].) He chose the new law. (See App. A to No. 82-844, p. 4; 682 F.2d at 689-90 & 690 fn. 3.)

The decision of the Seventh Circuit below—requiring that Massarella be resentenced under the old law—cannot now be implemented without doing grave violence to his most basic constitutional rights, embodied not only in the *ex post facto* clause, but also in the concept of due process

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[5] Defendant Massarella's election is the subject of the still-pending State post-conviction proceedings. Adding to the tangled web concerning remedies, Appellate Court in its second opinion hinged its ultimate conclusion on the *ex post facto* issue against Massarella upon its perception that he had made a valid election to be sentenced under the new law: "Massarella elected to be sentenced under the Unified Code of Corrections." 36 Ill.Dec. at 22, 400 N.E.2d at 442. In denying the post-conviction petition, the trial court specifically held that the Appellate Court's second opinion was *res judicata* (PC R. 19-20), and stressed that defendant did not claim a right or desire to be sentenced under the old law. (PC R. 19). (References are to the Record on Appeal in No. 82-1348. See fn. 2, p. 4, *supra* and accompanying text.)

of law. Although the court admonishes that no "more onerous sentence" be imposed, (App. A to No. 82-844, p. 6; 682 F.2d at 690), the constitutionally-required standard, of course, is not the sentence actually imposed, but, rather, that which theoretically could have been imposed. *Lindsey v. Washington*, 301 U.S. 397, 402, 81 L.Ed. 1182, 1186 (1937).

That portion of the Seventh Circuit's decision holding that changing the nature of the offense after the fact is unconstitutional, is correct—but, for the reasons advanced in our Pet. No. 82-844, the decision does not go far enough with respect to remedies.

The selection of remedy mandated by the Seventh Circuit's opinion—that is, that Massarella be resentenced under the old law—places him in the constitutionally impermissible position of being resentenced under the very law he had elected not to be sentenced under, when made to choose in the trial court. Only vacature of the judgment of conviction, rather than resentencing, can ameliorate the constitutional violation.

## CONCLUSION

For the reasons stated above, as well as for the reasons set out in our Petition No. 82-844, we agree that certiorari should be allowed.[6]

And, on the merits, the Seventh Circuit's order should be reversed and the cause remanded to the District Court with instructions to vacate Massarella's conviction and grant the Great Writ.

Respectfully submitted,

JULIUS LUCIUS ECHELES
*Attorney for Petitioner*

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[6] We respectfully suggest that if Your Honors see fit to grant certiorari either upon No. 82-811 or upon No. 82-844, all of the questions presented by both of these petitions should be addressed on the merits.